JOURNAL

OF THE

SOCIETY OF COMPARATIVE LEGISLATION.

EDITED FOR THE SOCIETY BY

SIR JOHN MACDONELL, C.B., LL.D.,

AND

EDWARD MANSON, Esq.

"Δεῖ καὶ τὰς ἄλλας ἐπισκέψασθαι πολιτείας . . . ἵνα τό τ'ὀρθῶς ἔχον ὀφθῇ καὶ τὸ χρήσιμον."—Arist. *Pol.* II. 1.

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SIR JAMES ROSE INNES, K.C.M.G.,

[*Contributed by* Dr. W. R. Bisschop.]

The eminent lawyer whose portrait adorns the first page of this volume, and who has succeeded in distinguishing himself in a threefold capacity, as an advocate, a politician, and a judge, may be styled a true South African and child of the country in which he was born. He received his entire education in Cape Colony, and never came to Europe to "finish" that education, as was the case with so many of his contemporaries who have since placed their mark upon the history of South Africa. In so far as his legal studies were never conducted on the accepted classical lines by the teachers of law of his time, Sir James may be considered a self-made man in the legal world of South Africa. His self-teaching may have assisted him in preserving originality of thought; it certainly accounts for his great fidelity to the historic institutions of the South African soil and the legal principles which that continent inherited from the great jurists of Rome and the Dutch Republic.

As a lawyer, Sir James has always shown himself a staunch defender of the Roman-Dutch law principles; as a politician, a warm supporter of a native policy which, for its broad-mindedness, is generally considered as going too far in the eyes of South African politicians of the day. No doubt we may trace in this the influence of his education by his father, Mr. J. Rose Innes, C.M.G., who was a Resident Magistrate in various parts of Cape Colony, and at one time Under Secretary for Native Affairs.

Born on January 8, 1855, at Grahamstown, the future Chief Justice was successively educated at Uitenhage and Bedford, where his school companions were, among others, Sir William Solomon, now with him a member of the Appellate Division of the Supreme Court of South Africa; Sir Richard Solomon, now High Commissioner in London for the Union of South Africa; Mr. W. P. Schreiner, now member of South Africa's Senate; Mr. J. W. Leonard, the late leader of the Transvaal Bar; and Mr. W. O. Danckwerts, K.C. Afterwards he studied at Gill College at Somerset East (where his father had been appointed Resident Magistrate) and obtained his B.A. degree at the University of Cape Town. He was then appointed clerk on the staff of the Standard Bank at Somerset East.

Banking business was, however, only a means to an end. Mr. Innes' mind was set upon a legal career, and during the hours when the bank did not

lay claim to his services, he continued with the assiduity which has marked all his endeavours the legal studies which he had commenced immediately on his obtaining the B.A. degree. These studies he pursued unaided. When he found that office work and office hours interfered too much with them, he went to Cape Town, in order to give all his time and energy to preparation for call to the Bar, receiving some assistance from Mr. Twentyman Jones, afterwards for several years Puisne Judge of the Supreme Court of the Cape Colony.

Mr. Innes was called to the Bar on February 12, 1878, and was appointed Queen's Counsel on May 21, 1890.

Of his career as an advocate a contemporary gave the following description:

> Painstaking, patient, and laborious, he worked up every case thoroughly both as to the law and as to the facts. Fluent of speech, never wearying the Court, he was listened to with attention and respect. Thoroughly honest and fair in his representation of facts, as well as his quotations of law, his word was trusted and taken without further proof being required. From the commencement of his career at the Bar Mr. Innes made it a rule (one which the late Sir Charles Brand and the late F. S. Watermeyer and a few others had followed) not only to work up the law of the case on his own side, but also in anticipation of what the other side might have to say and quote, so as to meet his opponent's arguments at once in reply.[1]

Mr. Innes' ambitions carried him further. It was not long before he entered the political arena, and there, as in his forensic career, he showed his ability, assiduity, and seriousness of purpose.

As a member of the Cape Legislative Assembly, first for Somerset East and afterwards for Cape Town, he took a specially prominent position with regard to natives and native policy. When, in the golden days of Rhodes' rising genius, Mr. Innes, K.C., was asked and consented to join Rhodes' Cabinet in 1900 as Attorney-General, he seized the opportunity of passing through Parliament, though not without difficulty, an Act prohibiting the sale of intoxicating liquors to natives, which since has become known as "Innes' Liquor Act." Opportunity failed him for further legislative endeavours in favour of the natives, for in 1893 he seceded from the Rhodes Ministry, together with Mr. Merriman and Mr. Sauer, for reasons which have since become part of the political history of South Africa, and he returned to his private practice, which he had abandoned while Attorney-General.

During his tenure of office as Attorney-General he had also, among other measures, succeeded in embodying the English company law in the Cape Companies Act, 1892.

During the following turbulent years of South African history Mr. Innes did not play an active *rôle* in South African politics. When he went to Pretoria in 1896 to attend the trial of the Reform Committee prisoners, he held a watching brief on behalf of the British Government. It was not until

[1] *South African Law Journal*, 1892, p. 2.

June 1900, after the fall of Mr. W. P. Schreiner's Cabinet, that Mr. Innes again took office and accepted the Attorney-Generalship in Spriggs' fourth Ministry. This time again his tenure of office was of short duration, and when it came to an end, eighteen months afterwards, his short but honourable political career closed. In the meantime—on the occasion of the present King's (then Duke of York's) visit to South Africa in 1901—he had been created K.C.M.G.

As soon as, at the end of the South African war, it was decided to discontinue the Military Courts in the Transvaal, and to reintroduce the Civil Courts, Sir James was asked to accept the Chief Justiceship, which he did. On April 12, 1902, Sir James changed the Attorney-General's wig and gown for the robes of a Chief Justice, as, before him, had been done by the present Lord de Villiers of Wynberg; and he took his seat on the Bench of the High Court of the Transvaal. After the Peace of Vereeniging, Sir James was, in June 1902, appointed Chief Justice of the Transvaal Colony.

During the eight years of his judgeship at the head of the Transvaal Bench Sir James displayed the same characteristics as he had done in his forensic and political work. Painstaking, patient, and upright, he showed himself not only a good judge, but especially ambitious to uphold the traditions of that Bench, so ably laid down by his predecessors, Chief Justices Kotzé and Gregorowski, to maintain the Roman-Dutch law as the common law of South Africa, irrespective of influences from outside which threatened to clash with its faithful interpretation and true development along the lines historically laid down. In doing this he was able to rely on his great store of knowledge of Roman law, and on the assistance of his able colleague and former school-fellow, Sir William Solomon, and of Mr. Justice Wessels. His well-known decision in *Rood* v. *Wallach*, among others, bears testimony to his aversion to adopting doctrines which are entirely foreign to the Roman-Dutch law, and which, if admitted, would of necessity destroy its character and hamper its development along lines of its own.

Thus he placed his mark on his judicial career, and showed himself fully qualified for the duties which recently have been placed on his shoulders. In 1909 the so much desired Union of South Africa became an accomplished fact. Together with the Union, in the South Africa Act, 1909, a permanent Court of Appeal was created for the four provinces of the Union as an Appellate Division to the Supreme Court of South Africa, hitherto fulfilled by the Judicial Committee of the Privy Council, to consist of the Chief Justice of South Africa, two ordinary and two additional judges of Appeal, with its seat at Bloemfontein in the Orange Free State.

Therewith the foundation has been laid for the creation of uniformity of law in South Africa which was so much desired. It augurs well for the continuance of South Africa's common law that the task of creating that uniformity has been entrusted to men who have so long been prominent

as staunch supporters of the supremacy of Roman-Dutch law. Lord de Villiers, Sir William Solomon, and Sir James Rose Innes, since June 4, 1910—when this Court of Appeal was inaugurated—its three permanent members, are so many guarantees for the true interpretation of Roman-Dutch legal doctrines—not the least Sir James, who has so assiduously maintained the principles of Roman-Dutch law in their integrity.

Sir James when a member of the Cape Bar, married Miss Pringle, of the Bedford district, in Cape Colony.

THE INTERNATIONAL LAW ASSOCIATION CONFERENCE: A SURVEY

[*Contributed by* LORD ALVERSTONE L.J.C.]

THE Conference of the International Law Association recently held in London has again brought out in strong relief the great importance of unification of private International Law so far as it affects commercial matters. Some of the papers, however, have directed attention to other branches of law in which the study of the systems of different civilised nations may be of great value to the community at large.

The deliberations and discussions at the recent Conference deserve more than a passing notice, if for no other reason at least with the object of directing attention to branches of the law of civilised nations which well repay comparison and justify attempts at unification. It is no part of this notice to refer to the past work of the International Law Association; that topic was sufficiently dealt with in the admirable address of the President, Lord Justice Kennedy. Founded in 1873 by a few enthusiasts in the cause of codification of the law, it passed in its earlier years through what may not unfairly be described as a somewhat cold and benevolent patronage. Its work, however, during the last twenty years has more than justified the expectations of its founders, and the character of the papers read at the last Congress, both from the point of view of study and of practical value, not only showed a marked advance over the earlier communications to the Association, but also demonstrated the value of such conferences as giving the lawyers of different nations the opportunity of considering the systems which prevail among their civilised neighbours.

The number and variety of the subjects dealt with at the recent Conference render impossible any attempt to review the subjects discussed in detail, or to suggest any concrete conclusions as the result of the discussions. The following lines are only written in order to direct attention to certain salient features which have not hitherto received much consideration on the part of those expert in the study of private International Law.

One chord of sadness must be struck in referring to the recent death of Mr. Justice Walton. Practically the last work that he did was to prepare a paper on *The Limits of State Interference with Maritime Contracts*, which he only completed a few hours before it was read at the meeting of the Association on the afternoon of Wednesday, August 3.

The interesting communication upon the subject of International Arbitration contributed by Dr. Evans Darby was in fact the continuation of many other previous contributions of a like kind, showing the increased and increasing acceptance by civilised nations of the practice of submitting to international arbitration differences which arise between them. It is worthy of note that the period of fifteen years has seen fulfilled and brought into practical recognition the hopes and aspirations of many who discussed the subject of international arbitration during the earlier years of the Association. The question of the establishment of an International Court was the subject of lengthy discussion at Brussels in the year 1893, when many of the arrangements actually in existence to-day at The Hague were regarded as a counsel of perfection almost beyond the expectations of then living men. In the present atmosphere of national emulation it is not possible to suggest that the increasing popularity of international arbitration has conduced to the reduction of armaments, but probably the seed so sown will bear fruit, and those who come afterwards may see the dawn of that universal peace in the hope of which the founders of the International Law Association so earnestly and ardently laboured.

The discussion of the Declaration of London—the outcome of the International Conference in the year 1909—should be of the highest value in directing the attention of the civilised world to the complicated questions raised by that Declaration. It is needless to say that the paper of Mr. Arthur Cohen, who was Counsel for Great Britain in the Geneva Arbitration in the year 1872, directed attention in a masterly way to the leading questions which are involved in the Declaration. The view of Sir John Macdonell, himself a great expert, may be regarded by some as being too optimistic, but on the other hand it is a very valuable contribution to the consideration of the question, and directs attention to certain points in regard to which further developments may be properly considered. One cannot leave the subject without calling attention to the justice of many of the criticisms embodied in the very able paper of Dr. Baty.

The papers upon the subject of compensation to workmen were of very high value, both from the historic and practical points of view. It is quite impossible to discuss the details of the very interesting contributions of Sir John Gray Hill and Dr. Mignault, but a consideration of these papers, and the discussion which followed them, cannot fail to raise in many minds a doubt as to whether this and other civilised countries have not gone too far in the direction of protecting workmen, and whether it would not have been better to have acted upon the principle, adopted in some other countries, of a system of universal assurance against accidents of all kinds, to which the workmen, as well as the masters, should contribute. There is ground to fear that the result of recent legislation has been to render more difficult the obtainment of employment by the older as compared with the younger workmen.

The discussion upon the papers read upon the interference of the State in matters of contract will always be connected with the memory of the late Mr. Justice Walton, who, as already stated, prepared specially upon that subject a paper read before the Congress, in which he dealt, with his usual lucidity, with the different grounds upon which interference by Governments might be justified. This paper, and that of Mr. Stephens upon the Harter Act, brought out in relief the extreme importance and desirability of some international agreement being arrived at as regards the limits, if any, which should be placed upon contracts of carriage. The subject is a large one, but the discussion upon the Harter Act showed what injustice may be done if nations attempt to restrain contracts in regard to goods imported into their country. This branch of the law is closely connected with the previous work of the Association, for by its labours the York-Antwerp Rules of Marine Insurance were established, and the previous Reports on contracts of affreightment touched on many of the points which arise in connection with restrictions upon maritime contracts. It may be hoped that future papers will direct attention to the unification of the law, so that the vendors and purchasers of goods may know exactly what are risks borne by the carriers and the dangers against which they must protect themselves, and thereby simplify contracts of insurance. The convenient practice of having one bill of lading to cover land transport, transshipment, railway carriage, and marine transit brings out in relief the importance of the question. There is no doubt that there must be mutual concession; insistence by any commercial country upon particular rules such as those embodied in the Harter Act passed in the United States of America might be a fatal bar to a uniform system applicable to all commercial countries.

The discussion as to the Law of Divorce raised many difficult points, and brought out into strong relief the embarrassing position in which parties are placed where the marriage contract has been made between persons of different nationality, and where the offences against the matrimonial contract have taken place in countries governed by a different law, and further the different effect attributed to judgments or decrees in divorce by the Courts of different countries. In this matter it is most desirable to proceed with caution; but the result of the various papers on the discussion thereon seem to indicate that at any rate as regards the grave matrimonial offences of adultery, cruelty, and desertion a great many, if not all, of the civilised countries might agree as to the extent to which they should afford ground for dissolution of the matrimonial contract, and as to the extent to which the rights of the spouses should be equal. It seems almost hopeless that anything like universal agreement upon all the debatable points will be reached. The condition of the Marriage Laws referred to by Sir Robert Phillimore thirty-one years ago, and quoted by the President, Lord Justice Kennedy, no doubt calls for amendment;

but, upon the other hand, the subject is so thorny, and beset not only with religious difficulties, but touches closely the manners and customs of different countries, that it seems scarcely possible to hope to obtain anything like universal agreement.

One of the subjects which received more consideration than at previous Conferences was that of the administration of the Criminal Law, and most interesting papers on the differences of the criminal procedure in France and Great Britain were read by M. de Monlue and Mr. Ernest Todd, and by Mr. Charteris on the criminal procedure in Scotland. These papers and the discussion which followed upon them showed clearly that each country has much to learn from the other two. To an English lawyer the procedure in France, whereby the accused is at the early stages of proceedings subjected to a severe cross-examination, and the judge presiding at the trial appears as an advocate, is very distasteful. On the other hand, the practice which prevails in England of allowing a prisoner to develop a defence at the trial without any notice beforehand to the prosecution does not promote the interests of justice; it is a snare to the innocent and may at times enable the guilty to go unpunished. It would be well worth the while of some competent student of the Criminal Law to frame a scheme in which the best features of the English, Scottish, and French systems might be combined, both as regards the original procedure and the right and practice on appeals. This subject, as already stated, has not hitherto very closely engaged the attention of the members of the Association. It is not saying too much to express the hope that the very valuable papers contributed at the last Congress may induce experts in Criminal Law in this country and in others to approach the problem of formulating an ideal system following on the work hitherto performed by the Association.

The Resolutions arrived at upon the subject of cheques marked a step towards international agreement. They do not go very far, and of course the different systems which prevail among bankers in different civilised countries make complete agreement difficult, but in the continuous drawing together of the different commercial communities of the world it is in the highest degree important that international agreement in connection with banking should, as far as possible, receive universal assent.

The proposal to include arbitral decrees and records among the judicial orders which can be executed in foreign countries raises very difficult questions. It is open to considerable doubt whether anything short of a judgment of the Supreme Court in civilised countries ought to receive recognition as of right in a foreign country. On the other hand, if parties in a dispute have submitted their differences to a competent tribunal, and have been fully heard, there is much to be said in favour of the argument that an award so arrived at should be respected by all foreign countries.

This brief résumé of some of the important matters raised at the recent Conference leads one to the consideration of the value which should be

assigned to such Associations. They cannot take the place of, nor can their deliberations have as high an authority as, the Institute of International Law, founded in the same year, consisting solely of jurists of repute, and a branch of their work may possibly be better performed by such minor combinations as the Maritime Committee, which during the last few years has been dealing with the questions of salvage, collisions at sea, and maritime contracts; but, upon the other hand, there is ample room for such an Association. The opportunity which their conferences afford for lawyers of different countries to meet together to discuss questions of mutual interest, to amplify their own experience by the experience of others, and to meet to consider points in which systems of other countries differ from and, maybe, are superior to their own, is an ample justification of its existence.

THE NORTH ATLANTIC COAST FISHERIES ARBITRATION.

[*Contributed by* Sir Erle Richards, K.C., K.C.S.I.]

The North Atlantic Coast Fisheries Arbitration was concluded, so far as the main issues are concerned, by the Award given on September 7 last. There are some subsidiary points, arising out of the answer to the first question, which may have to be referred back to the Tribunal, if they should not prove capable of adjustment by the procedure set up by the Arbitrators or by negotiation. But all the substantial matters in dispute have been determined by the Award itself. The case was the most important which has as yet been heard before the Permanent Court at The Hague, and with the possible exception of the Arbitration on the Alabama claims, the most important in which Great Britain and the United States have ever been concerned: indeed the differences now set at rest, or some of them at least, have existed for the best part of a century, and have been the cause of frequent, and at times dangerous, friction. The fact that two great nations have been willing to submit a dispute of so grave a character to The Hague Tribunal, and that the proceedings have been conducted to a successful conclusion, marks a signal advance in the progress of international arbitration.

The Agreement to refer was made under the powers of the General Arbitration Treaty between Great Britain and the United States of 1908. Seven questions were stated in it for the decision of the Tribunal, and the procedure to be followed was in part specified and for the rest was left to be governed by the provisions of The Hague Convention for the settlement of international disputes of 1907. The Arbitrators were selected by agreement from the panel of members of the Permanent Court at The Hague. They were Mr. H. Lammasch of Austria, who was subsequently chosen as president; H.E. Jonkheer A. F. De Savornin Lohman of the Netherlands; the Hon. Judge Gray of the United States; the Right Hon. Sir Charles Fitzpatrick, Chief Justice of Canada; and the Hon. Luis Maria Drago of the Argentine Republic.

The usual procedure was followed in the preliminary stages, and written cases, counter-cases, and arguments were exchanged within the times specified in the Agreement. On June 1 the oral argument was commenced and continued till August 12, on which day it was finally concluded. The

case was opened on behalf of Great Britain by Sir R. Finlay, who spoke for eight days, and he was followed by Senator Turner, who occupied a like time. Then came, in order, Sir James Winter of Newfoundland, Mr. Warren of the United States, Mr. Ewart of Canada, and Mr. Elder of the United States. The Attorney-General summed up for Great Britain, and Senator Elihu Root for the United States.

The general nature of the questions in dispute is probably matter of common knowledge. They arose on the construction of the treaty of 1818 between Great Britain and the United States, and related to the extent of the rights conferred by that treaty on American fishermen in British North American waters. Under the Treaty of Independence of 1783 the inhabitants of the United States had a general right of fishing in those waters. But when the war of 1812 broke out between the two countries Great Britain held that this right had come to an end. The United States did not assent to the British view, but the difference between them did not at that time prove capable of adjustment, and the treaty of peace signed at Ghent in 1814 was silent as to the fisheries. Discussion and negotiation followed, and the dispute was finally settled by the treaty of 1818. It is therefore by the terms of that treaty that the rights of American fishermen in Newfoundland and Canadian waters are now governed.

The Award is a document of high importance both from an historical and a legal point of view. It is not confined to a mere statement of the answers of the Tribunal to the specific questions put to it, but discusses, in some detail, the main contentions advanced on either side and states with precision the reasons on which the answers are based. Of the questions referred, the greater number turn on the particular circumstances of the case and do not involve the consideration of any general principles of international law. But on the two main points of controversy—the question as to the right of Great Britain or her colonies to regulate the exercise of fishing rights by Americans in British waters and the question as to the extent of the bays from which Great Britain may exclude Americans—the Tribunal have expressed opinions which must leave an imprint on the law of nations.

On the first of these questions the British contention was, in short, that the mere grant of a liberty to fish did not carry with it any exemption from municipal regulation, that there was nothing in the treaty which could be construed as a surrender by Great Britain of her powers as the territorial sovereign of the waters in question, and that in the absence of any such provision those powers remained unaffected. It was admitted that the treaty imposed some limitation on the exercise of those powers, and that Great Britain must be taken to have agreed not to make laws or regulations which would restrict the fishing, carried on by Americans, unless such restrictions were necessary for the protection of the fisheries or the preservation of law and order or other like purposes and did not discriminate

unfairly between the fishermen of the two countries. Subject to this treaty obligation, Great Britain contended that she or her colonies might legislate without the approval or concurrence of the United States.

The American contention, on the other hand, was that Great Britain had no right at all to regulate the exercise of the treaty liberties and that even if such a right did exist it could be exercised only with the approval and concurrence of the United States.

Dealing with these contentions the Tribunal at the outset decides that the right to regulate is an attribute of sovereignty and as such must be held to reside in the territorial sovereign unless the contrary be provided in the treaty, and declares the onus to be on the United States to show that this had been done in the present case. The judgment on this point is of value: it is an express decision that the mere grant of a liberty such as that in question, without more, does not involve any surrender of the sovereign rights of the grantor State.

The Arbitrators then proceed to examine the arguments advanced by the American counsel in order to discharge this onus, and take up first those which went to show that Great Britain had no right of regulation at all. These are treated under nine separate headings, and the judgment of the Tribunal is stated in the form of reasons under each heading.

The discussion of the first two of these headings depends on the particular facts of the case, but that numbered (3) relates to a contention of general interest raised in the written argument of the United States and presented to the Tribunal with much force and learning by Senator Turner. It was, in effect, that the grant of fishing liberties in British waters to the inhabitants of the United States constituted an international servitude; and that it followed, according to the principles of international law, that Great Britain, the servient State, had no right to regulate the liberties so granted. In support of this proposition a large number of writers were quoted and special reliance was placed on an essay on the subject of State servitudes by Dr. Clauss. In reply to this argument it was pointed out by the British counsel, amongst other things, that the greater part of the passages cited had reference to the relations *inter se* of the States of the Holy Roman Empire; that no instance was adduced in which this suggested principle had ever been accepted in practice; and that if it were to receive the sanction of the Tribunal it would apply equally to treaties conferring rights to trade, to reside, and the like, and that the consequences would be far-reaching.

The Arbitrators have rejected the American argument on this point. They hold that the doctrine of international servitude was not one with which the negotiators of 1818 were familiar, and they decline to accede to the proposition of international law involved in the contention of the United States. Their reasons, so far as they bear on the general question of law, are stated in the following paragraphs:

Because a servitude in international law predicates an express grant of a sovereign right and involves an analogy to the relation of a *prædium dominans* and a *prædium serviens*; whereas by the treaty of 1818 one State grants a liberty to fish, which is not a sovereign right, but a purely economic right, to the inhabitants of another State;

Because the doctrine of international servitude in the sense which is now sought to be attributed to it originated in the peculiar and now obsolete conditions prevailing in the Holy Roman Empire of which the *domini terræ* were not fully sovereigns; they holding territory under the Roman Empire, subject at least theoretically, and in some respects also practically, to the Courts of that Empire; their right being, moreover, rather of a civil than of a public nature, partaking more of the character of *dominium* than of *imperium*, and therefore certainly not a complete sovereignty. And because in contradistinction to this quasi-sovereignty with its incoherent attributes acquired at various times, by various means, and not impaired in its character by being incomplete in any one respect or by being limited in favour of another territory and its possessor, the modern State, and particularly Great Britain, has never admitted partition of sovereignty, owing to the constitution of a modern State requiring essential sovereignty and independence;

Because this doctrine being but little suited to the principle of sovereignty which prevails in States under a system of constitutional government such as Great Britain and the United States, and to the present international relations of sovereign States, has found little, if any, support from modern publicists. It could therefore in the general interest of the community of nations, and of the parties to this treaty, be affirmed by this Tribunal only on the express evidence of an international contract.

The fourth heading relates to the meaning of the words "in common" used in the treaty, and is not of general importance.

The fifth heading deserves attention on account of its historical interest. It relates to the theory of "partition," which has been much relied on by the United States. It was said that the treaty of 1783 was not a treaty between two independent Powers, but was a partition of common property between two co-owners, and that the co-owners preserved their sovereign rights in the parts respectively allotted to them; that the United States therefore had sovereign rights in these fisheries. It was then argued that the war of 1812 did not terminate the treaty of 1783, and that the treaty of 1818 was a mere renewal of the same fishing rights as were granted by the former treaty. It followed, as it was said, that the treaty of 1818 must also be construed as a partition between co-owners, and not as a grant of fishing rights to an alien Power by the sovereign of the waters covered by the grant.

On this point too the Tribunal have rejected the American argument. Their judgment is as follows:

Although the Tribunal is not called upon to decide the issue whether the treaty of 1783 was a treaty of partition or not, the questions involved therein having been set at rest by the subsequent treaty of 1818, nevertheless the Tribunal could not forbear to consider the contention on account of the important bearing the controversy has upon the true interpretation of the treaty of 1818. In that respect the Tribunal is of opinion:

(*a*) That the right to take fish was accorded as a condition of peace to a foreign people; wherefore the British negotiators refused to place the right of British subjects on the same footing with those of American inhabitants; and further, refused to insert the words also proposed by Mr. Adams—"continue to enjoy"—in the second branch of Art. III. of the treaty of 1783;

(*b*) That the treaty of 1818 was in different terms, and very different in extent, from that of 1783, and was made for different considerations. It was, in other words, a new grant.

It will be observed that the general question of the effect of war on treaties, a subject on which international law does not at present speak with precision, is not dealt with in the judgment. It was unnecessary to do so since the Arbitrators held that the treaty of 1818 was a new grant.

The other headings under the first contention are not of general importance.

In regard to the second contention, that the right of regulation, even if it existed at all, could not be exercised by Great Britain without the consent of the United States, the decision of the Tribunal is equally adverse to the American claims. It is to be best gathered from the following extracts from the judgment:

Considering that the recognition of a concurrent right of consent in the United States would affect the independence of Great Britain, which would become dependent on the Government of the United States for the exercise of its sovereign right of regulation, and considering that such a co-dominium would be contrary to the constitution of both sovereign States, the burden of proof is imposed on the United States to show that the independence of Great Britain was thus impaired by international contract in 1818 and that a co-dominium was created.

For the purpose of such proof it is contended by the United States:

That a concurrent right to co-operate in the making and enforcement of regulations is the only possible and proper security to their inhabitants for the enjoyment of their liberties of fishery, and that such a right must be held to be implied in the grant of those liberties by the treaty under interpretation.

The Tribunal is unable to accede to this claim on the ground of a right so implied:

Because every State has to execute the obligations incurred by treaty *bona fide*, and is urged thereto by the ordinary sanctions of international law in regard to observance of treaty obligations. Such sanctions are, for instance, appeal to public opinion, publication of correspondence, censure by Parliamentary vote, demand for arbitration with the odium attendant on a refusal to arbitrate, rupture of relations, reprisals, etc. But no reason has been shown why this treaty, in this respect, should be considered as different from every other treaty under which the right of a State to regulate the action of foreigners admitted by it on its territory is recognised;

Because the exercise of such a right of consent by the United States would predicate an abandonment of its independence in this respect by Great Britain, and the recognition by the latter of a concurrent right of regulation in the United States. But the treaty conveys only a liberty to take fish in common, and neither directly nor indirectly conveys a joint right of regulation;

Because if the consent of the United States were requisite for the fishery a general veto would be accorded them, the full exercise of which would be socially subversive and would lead to the consequence of an unregulatable fishery;

Because the United States cannot by assent give legal force and validity to British legislation.

In the result the Tribunal has decided in favour of Great Britain on Question I., and has set up a procedure by which disputes as to the reasonableness of any future regulation may be determined, in accordance with the provisions of Art. IV. of the Agreement to refer. Objections to existing regulations will be considered by the Tribunal itself, if not settled by the experts appointed to report on them.

The second subject of general importance is that involved in the discussion of Question V. as to the extent of the inclosed waters which may be properly claimed as territorial according to the law of nations. By the treaty of 1818 the United States renounced any liberties of taking fish or drying or curing fish theretofore enjoyed or claimed on or within three marine miles of any of the coasts, bays, creeks, or harbours of H.B.M.'s Dominions in America within certain limits. The bays in question were, speaking generally, those on the coast of Canada, and those on the E. and S.E. coast of Newfoundland. It will be seen on reference to a map that there are a large number of bays on these coasts varying greatly in size and configuration, including some tracts of water of considerable extent, such as the Bays of Chaleur and Miramichi in Canada, and Fortune and Conception Bays in Newfoundland. The Bay of Fundy is the subject of a special agreement of many years' standing, and was not included in the present reference, nor was the Gut of Canso.

The difference between the two countries was as to the meaning of the word "bays" in this clause. In short, Great Britain contended that the term included all those waters which were generally known as bays in 1818: the United States contended that it applied only to waters included within the three-mile line from shore, that is, to bays of which the entrance was not more than six miles in width.

The judgment of the Tribunal commences by pointing out that the term "bays" is used in the treaty without qualification, and decides that the term—

must be interpreted in a general sense as applying to every bay on the coast in question that might be reasonably supposed to have been considered as a bay by the negotiators of the treaty under the general conditions then prevailing, unless the United States can adduce satisfactory proof that any restrictions or qualifications of the general use of the term were or should have been present to their minds.

The arguments of the United States are then examined in order. The Tribunal rejects the proposition that a State cannot renounce the natural right to fish on the high seas, and points out that such an abandonment had

been made in these very waters by France and Spain respectively. It rejects the argument that the expression "bays of His Britannic Majesty's Dominions" must be read as including only those bays which were under the territorial sovereignty of Great Britain. It holds that the expression is used in a geographical sense, and has no reference to political control.

The Tribunal then passes on to the contention that the three-mile limit which applied in regard to coast applies equally to bays. On this point the material passages in the Award are as follows:

It has been further contended by the United States that the renunciation applies only to bays six miles or less in width *inter fauces terræ*, those bays only being territorial bays, because the three-mile rule is, as shown by this Treaty, a principle of international law applicable to coasts and should be strictly and systematically applied to bays.

But the Tribunal is unable to agree with this contention:

Because admittedly the geographical character of a bay contains conditions which concern the interests of the territorial sovereign to a more intimate and important extent than do those connected with the open coast. Thus conditions of national and territorial integrity, of defence, of commerce, and of industry are all vitally concerned with the control of the bays penetrating the national coast line. This interest varies, speaking generally, in proportion to the penetration inland of the bay; but as no principle of international law recognises any specified relation between the concavity of the bay and the requirements for control by the territorial sovereignty, this Tribunal is unable to qualify by the application of any new principle its interpretation of the treaty of 1818 as excluding bays in general from the strict and systematic application of the three-mile rule; nor can this Tribunal take cognisance in this connection of other principles concerning the territorial sovereignty over bays such as ten-mile or twelve-mile limits of exclusion based on international acts subsequent to the treaty of 1818 and relating to coasts of a different configuration and conditions of a different character;

Because the opinion of jurists and publicists quoted in the proceedings conduce to the opinion that speaking generally the three-mile rule should not be strictly and systematically applied to bays;

Because from the information before this Tribunal it is evident that the three-mile rule is not applied to bays strictly or systematically either by the United States or by any other Power.

The Tribunal has therefore expressly rejected the proposition that the three-mile rule, which is generally accepted in regard to open coasts, applies equally to inclosed waters.

The next point is also of general interest:

It is further contended by the United States that such exceptions only should be made from the application of the three-mile rule to bays as are sanctioned by conventions and established usage.

But the Tribunal, while recognising that conventions and established usage might be considered as the basis for claiming as territorial those bays which on this ground might be called historic bays, and that such claim should be held valid

in the absence of any principle of international law on the subject; nevertheless is unable to apply this, *a contrario*, so as to subject the bays in question to the three-mile rule, as desired by the United States:

(*a*) Because Great Britain has during this controversy asserted a claim to these bays generally, and has enforced such claim specifically in statutes or otherwise, in regard to the more important bays such as Chaleur, Conception, and Miramichi.

(*b*) Because neither should such relaxations of this claim, as are in evidence, be construed as renunciations of it; nor should omissions to enforce the claim in regard to bays as to which no controversy arose be so construed. Such a construction by this Tribunal would not only be intrinsically inequitable but internationally injurious; in that it would discourage conciliatory diplomatic transactions and encourage the assertion of extreme claims in their fullest extent.

The award on the whole question is summarised as follows:

The negotiators of the Treaty of 1818 did probably not trouble themselves with subtle theories concerning the notion of "bays"; they most probably thought that everybody would know what was a bay. In this popular sense the term must be interpreted in the Treaty. The interpretation must take into account all the individual circumstances which for any one of the different bays are to be appreciated, the relation of its width to the length of penetration inland, the possibility and the necessity of its being defended by the State in whose territory it is indented; the special value which it has for the industry of the inhabitants of its shores; the distance which it is secluded from the highways of nations on the open sea, and other circumstances not possible to enumerate in general.

For these reasons the Tribunal decides and awards:

In case of bays the three marine miles are to be measured from a straight line drawn across the body of water at the place where it ceases to have the configuration and characteristics of a bay. At all other places the three marine miles are to be measured following the sinuosities of the coast.

This is in substance an acceptance of the British contention.

The Tribunal has not, however, contented itself with the mere expression of an opinion on the question of construction. The Arbitrators have thought that the Award by itself would still leave room for dispute in its application to particular cases. They therefore recommend that the parties should accept an arrangement which follows very closely, if it is not identical with, the Chamberlain-Bayard Treaty of 1888 which was accepted by Great Britain but rejected by the Senate of the United States at that time. The effect is to delimit specific boundaries at the entrances of ten of the most important bays, and as to the smaller bays to fix a general boundary by a line drawn three miles seaward from the point where each bay narrows to ten miles. This general limit of ten miles is supported by reference to the various Fisheries Conventions under which a similar rule has been adopted and found convenient in practice. Conception Bay is given to Great Britain because it was covered by the decision of the Privy Council in the case of *The Direct United States Cable Company* v. *The Anglo-American Telegraph Company* (L.R. 2

A.C. 374) in which decision the Tribunal holds the United States to have acquiesced. This recommendation is made under Art. IV. of the Compromis.

On this question and on this alone the Tribunal is not unanimous. Dr. Drago has entered a written dissent in which he gives his reasons for holding that the treaty should be construed as applying to ten-mile bays only with the exception of the Bays of Conception, Chaleur, and Miramichi. The following passage appears to summarise the position of Dr. Drago :

> So it may be safely asserted that a certain class of bays, which might be properly called the historical bays such as Chesapeake Bay and Delaware Bay in North America and the great estuary of the River Plate in South America, form a class distinct and apart and undoubtedly belong to the littoral country, whatever be their depth of penetration and the width of their mouths, when such country has asserted its sovereignty over them, and particular circumstances such as geographical configuration, immemorial usage, and above all, the requirements of self-defence, justify such a pretension. The rights of Great Britain over the bays of Conception, Chaleur, and Miramichi are of this description. In what refers to the other bays, as might be termed the common, ordinary bays, indenting the coasts, over which no special claim or assertion of sovereignty has been made, there does not seem to be any other general principle to be applied than the one resulting from the custom and usage of each individual nation as shown by their treaties and their general and time-honoured practice.

It will be observed that the learned Arbitrator differs from his colleagues in holding that the treaty refers to territorial bays only and in thinking that the limit of territorial jurisdiction over bays should be fixed by the custom and usage of each individual nation. In the present case he would fix the limit by reference to the North Sea Conventions and Regulations to which Great Britain had been a party from 1839 to 1882. He does not think that the fact that Great Britain has during this controversy continually asserted a wider claim in regard to the bays in question is sufficient to outweigh this usage, although it is subsequent to the treaty. He is of opinion that the ten-mile rule for bays is connected with the three-mile coast limit and is simply "an extension, a margin given for convenience to the strict six miles with fishery purposes." After examining the various cases in which Great Britain has assented to the ten-mile limit in the North Sea, since 1839, he holds—

> that a usage so firmly and for so long a time established ought, in my opinion, to be applied to the construction of the treaty under consideration, much more so when custom, one of the recognised sources of law, international as well as municipal, is supported in this case by reason and by the acquiescence and the practice of many nations.

It has not been the purpose of this note to do more than to point out the procedure followed by the Tribunal and to call attention to the questions of general law dealt with in the Award. The judgments on these questions will necessarily command the deliberate attention of the

statesmen and lawyers of all countries: and both on them and on those which depend on the particular facts of the case, there is certain to be the fullest discussion on other occasions and in other places. On some points there may be, and will be, differences of opinion in the countries affected, but it is satisfactory to know that all parties left the court in the confident assurance that their respective arguments had been patiently heard and fully considered. And if it may be permitted, with the greatest respect, to place the fact on record, the dignity and impartiality of the Tribunal, throughout the long hearing, were worthy of the great Court of which the Arbitrators are members.

THE COMMONWEALTH CONSTITUTION AND ITS DEVELOPMENT.

[*Contributed by* Sir Courtenay Ilbert, K.C.B., K.C.S.I.]

Mr. Harrison Moore's *Commonwealth of Australia*, of which the first edition appeared in 1902, the year after the establishment of the Commonwealth, at once took rank as a constitutional treatise of the highest value and importance. He has now brought out a second edition, and has incorporated in it the materials which have accrued up to the date of the last general election in May 1910. During the nine years and more which have elapsed since the Constitution was brought into being, it has been developed in various ways, by amending and supplementary legislation, by interpretations and decisions of the Australian High Court and the Judicial Committee of the Privy Council, by administrative and parliamentary practice and usage. Of all these materials Mr. Moore has made careful, abundant, and instructive use. In his first edition he traced the history, described the ground plan, and elucidated the fundamental principles of the Constitution. In this new edition he has been able to show how the Constitution has worked in practice during the first critical years of its existence.

When this edition appeared, only two Acts amending the Constitution had obtained, by means of the referendum, the required approval of the electors. One of these modified the plan of election of senators, the other enabled the Commonwealth to take over State debts incurred since its establishment. Other amending Acts have since been passed by the new Parliament and await ratification by the electorate. But supplementary legislation, dealing with matters falling within the competence of, and requiring prompt attention by, the new central Legislature, has been extensive, varied, and important. They include the Acts transferring the Customs and Excise departments from the States to the Commonwealth, and imposing uniform duties of customs and excise; the Act establishing a general postal and telegraph service; Acts regulating the powers and procedure of the High Court and the constitution of the Commonwealth Civil Service; Acts regulating the parliamentary franchise at Commonwealth elections and prescribing the procedure to be observed on a referendum; a great Defence Act, constituting a defence force with two branches, the permanent forces and the citizen force; a general Trade Marks Act; and Acts dealing with difficult and highly controversial subjects, such as that passed for the gradual extinction of the system of im-

ported Kanaka labour in the northern part of the continent, those for imposing restrictions on immigration, the Act of 1902 dealing with industrial disputes extending beyond the limits of any one State and constituting a Commonwealth Court of Conciliation and Arbitration for the settlement of such disputes; and, lastly, a general Act for old-age pensions. All these measures (most of which are summarised in the "Legislation of the Empire") receive careful and adequate treatment from Mr. Moore.

Not less important are the judicial decisions of the same period. Among them are the income-tax cases, in one of which, *Webb* v. *Outrim*, the Judicial Committee found itself in conflict with the High Court. The Commonwealth Conciliation and Arbitration Act, 1902, has given rise to much litigation. In one case it was held that the jurisdiction under it extended to disputes between owners of and seamen on ships trading between Sydney and Calcutta. On the other hand, it has been held that the operation of the Act is limited by the rights and powers of the several States. Thus in the State Railway Servants case the High Court held that the specific inclusion in the Act of disputes in relation to employment on State railways was *ultra vires* as an invasion of the exclusive powers of the States. But in the Jumbunna case it was held that an association is competent to register under this Act, though it consists exclusively of persons engaged in industry in one State and in the employment of persons whose business is confined to that State. The nature of an "industrial dispute" and the circumstances in which it should be treated on extending beyond the limits of any one State were much discussed in the Woodworkers case and in the Broken Hill case. The great case of *The King* v. *Barger* raised in the broadest form the question of the relations between the Commonwealth and the several States, and gave rise to a serious difference of opinion between the majority and the minority of the High Court. The case arose out of an attempt by the Commonwealth Legislature to apply the principles of what is known in Australia as the "new protection," which aims at securing to the workman a reasonable share of any profit accruing to employers from protection taxes.

To effect this object in a particular industry the Legislature passed an Act entitled "The Excise Tariff, 1906," which, in the case of agricultural implements, imposed "duties of excise" on the manufactured article, but declared that it should not apply to goods manufactured under certain conditions as to the remuneration of labour. The majority of the Court held that the Act was invalid, partly because it was an attempt to regulate the conditions of labour under the guise of a taxing Act, partly because it contravened the provision of the Constitution prohibiting discrimination or preference between the several States. The minority took a different view on both points. The judgments are of great interest and importance, both on account of the principles involved and on account of the personalities of the judges. The majority of them looked with evident suspicion on any attempt to encroach on the rights and powers of the several States. The minority

of two adopted principles of interpretation which tended to enlarge the powers of the central Legislature. The majority (Sir S. Griffiths C.J., Sir E. Barton, and Mr. Justice O'Connor) consisted of men all of whom had taken an active part in framing the Constitution. Of the minority one is the President of the Commonwealth Arbitration Court. One seems to discern a conflict between the older doctrine of federalism and the more recent tendency towards centralisation. The operation of the Commonwealth Customs Act has, as might have been expected, given rise to some very difficult questions on the respective rights of the Commonwealth and the States. In one case it was held that the importation of wire netting by the Government of New South Wales was controlled by the Commonwealth Act. In another case it was held that Commonwealth Customs duty could be claimed on steel rails imported by the same Government and intended to be used in the construction of State railways. These are merely a few instances of cases on which Mr. Moore has commented with much wealth of illustration, drawn largely from American decisions. The Constitution of Australia, differing widely as it does from that of the United States, approximates to it more closely in its judicial character than the Constitution of Canada, far more closely than the new Constitution of South Africa, and consequently American decisions on constitutional questions have, naturally and properly, always carried much weight with the Australian Courts.

On the development of the Australian Constitution in matters which have not called for legislative action or judicial decisions Mr. Moore has also written fully and suggestively. Nothing is more interesting than to study the extent to which a new constitution gives effect to the intentions and verifies the forecasts of its authors, and the history of the last nine years in Australia supplies ample materials for this study. Mr. Moore's last chapter, in which he draws general conclusions, has been modified since the first edition, and is sure to require modification in any future edition. The working of the Constitution has disclosed some weak points and has produced some unexpected results. The Labour Party, which began, as elsewhere, by being a disturbing element in Parliament, has at the last Commonwealth elections become the dominant party, more cohesive and better disciplined than any other group of persons or interests. "The attempt to combine the federal and the democratic principles in the constitution of the Senate," says Mr. Moore, "will probably be found to add one more to the failures to solve the problem of Second Chambers." This is not encouraging to constitution makers. But it is certain that the Senate has not played the part which it was intended to play. It was intended to do two things—to exercise a conservative influence on legislation, and to represent the States as against the Commonwealth. It has done neither. It is said to be as democratic and "advanced" in its views as the House of Representatives, possibly more so; and the States have found their protection against encroachment by the Commonwealth not in the Senate, but in the High Court. On the other hand, the periodical

conferences between the State Premiers and between them and the Prime Ministers of the Commonwealth, though not expressly or formally recognised by the instrument of government, have already played and seem likely to play a very important and useful part in the working of the constitution.

Mr. Harrison Moore's book may advantageously be studied in connection with two other recent books, written from somewhat different points of view. Mr. Keith's *Responsible Government in the Dominions* is written from the Colonial Office point of view, and studies Australia as a part of a larger problem. Mr. Wise, in his *Commonwealth of Australia*, writes as a lawyer who has taken an active and practical part in Australian politics. Mr. Harrison Moore's point of view is that of a professor of constitutional law, but of a professor living in the midst of the persons and things about which he writes.

THE GREAT JURISTS OF THE WORLD.

XII.—FRIEDRICH CARL VON SAVIGNY.

[*Contributed by* J. E. G. DE MONTMORENCY, ESQ.]

THE ancient family to which Friedrich Carl von Savigny belonged was of Lorraine origin, deriving its name from the Castle of Savigny, near Charmes, in the valley of the Moselle, and Paul de Savigny, an ancestor of the jurist, was born at Metz in 1622. The family were Calvinists, and retained their German allegiance on the transfer of Lorraine to France. Paul entered the Swedish army, and settled in a military capacity in Germany, dying at Kirchheim in 1685. His son Louis-Jean became a lawyer, and served the Prince of Nassau. In 1692 he published a work attacking the ambitious wars of Louis XIV. He died in 1701. His son Louis, who was born in 1684 and died in 1740, also held a political office. Chrétien-Charles-Louis, the son of Louis, was born in 1726 at Trabens on the Moselle, and attained to a considerable position in diplomatic and political circles. He was a member of the assembly which met at Frankfort to represent one of the ten Circles of the Empire, the Circle of the Upper Rhine. On this body he was a representative of various princes. Friedrich Carl von Savigny (to adopt the German form of the name) was born at Frankfort on February 21, 1779. The father of the jurist was a Lutheran, the mother a Calvinist. In those days the Calvinists were not allowed to worship in Frankfort, though the ministers were very gifted men. The town was dominated by the Lutherans, who made up for the inefficiency of their clergy by the sufficiency of their police. The Calvinists were obliged to worship out of the town at the village of Bockenheim, and thither, Sunday by Sunday, the little fellow was taken by his mother, despite the father's adherence to the popular faith.

His mother watched over the child's early education with exemplary care. M. Charles Guenoux tells us that "she taught him French with the tragedies of Racine and *Les Veillées du Château* of Madame de Genlis. He had hardly reached the age of three years when she was already reading the Bible to him, and perhaps we ought to attribute to her lessons and to her example that truly religious spirit which formed one of the salient traits in the

character of her son." Her life had many sorrows to foster her natural piety. All her children except Frédéric died young, and in 1791 her husband died. In 1792 she herself passed away, and at the age of thirteen Friedrich Carl von Savigny was left an orphan without sisters or brothers. His father's best friend, a famous lawyer, M. de Neurath, the Assessor of the Imperial Chamber at Wetzlar, became another father to the boy, and personally superintended the education of his son and Friedrich von Savigny. When they reached the age of fifteen he plunged them into a terrible course, comprising the science of law, natural law, international law, Roman law, German law, and so forth. The principles were driven into the boys' minds by the system of question and answer, and finally they were induced to commit to memory a vast volume of speculative thought. It was an extraordinary training, recalling to some extent the aridity of Mill's early life, but it was modified by the abiding influence of his mother and the personal tenderness of M. de Neurath. We are told that Savigny revolted against the unreality of this shadow-land of thought. Indeed his whole after-life of work was in a sense a protest against the unhistoric school of thought which robed in unreality his earliest period of intellectual effort. Neurath's lessons must, however, have been extraordinarily effective, for they turned the entire interests of the youth into the direction of the theory and history of law. At the age of seventeen (Easter 1795) he joined Marburg University, and attended successive courses by Erxleben and Weiss on the Pandects.

Weiss was a dramatic and effective teacher, and he placed his fine library at the disposal of Savigny, who became one of his private pupils. Indeed, though not a lawyer of great fame, he really turned the mind of Savigny in the direction of the change of method that was then in the air. Weiss was a bitter opponent of Wolff and other standard authors, and though he did not accept the entire views of Hugo and Naubold, he felt that a sense of history or evolution was a necessary element in the study of law. Savigny, who had suffered as a boy many things from what we may call the *à priori* school of law, drank in the new doctrine with avidity, and, passing in October 1796 to the University of Göttingen, his historical leanings were confirmed by the brilliant lecturing of Spittler on universal history. Göttingen had nothing else worth having to give this student, but it did, in fact, give him the one thing needful at that moment. An illness in the spring of 1797 interrupted work, and in October Savigny returned to Marburg for further study. From 1799 to 1800 he travelled through Germany, visiting various universities, including Leipzig and Jena, and devoting his entire time to study. In the year 1800 he received the degree of doctor at Marburg, his dissertation on the occasion being entitled *De concursu Delictorum formali* (*Vermischte Schriften*, iv. 74). The same year he became an authorised teacher (*Privat docent*) at Marburg, and lectured on criminal law. He also lectured (as an additional or extraordinary professor) on the ten last books of the Pandects Ulpian, the Law of Succession, Obligations, the Methodology of

Law, and the History of Roman Law. In these courses we indeed see laid out the ground-plan of his life's work. M. Guenoux (from whose work this life of Savigny is largely derived[1]) tells us of the growth of his attitude towards history. He says:

L'Histoire du droit romain de Hugo avait excité vivement l'intérêt de Savigny, et par ses formes souvent énigmatiques, plutôt éveillé que satisfait sa curiosité. Les améliorations de onze éditions successives ont plus que décuplé l'ouvrage original sans faire disparaître entièrement ce caractère. Au reste, Savigny a toujours professé une respectueuse reconnaissance pour les travaux de Hugo, et quoiqu'il n'ait jamais suivi ses cours, c'est peut-être le seul jurisconsulte moderne qui ait eu de l'influence sur son développement.

No doubt this is largely true, but in fact Savigny came upon the scene at a moment when there was a struggle in progress between the supporters of the school of traditional learning and thinkers of the Hegelian type who desired to demonstrate and share in the processes of evolution or history. It must be remembered that Savigny represents a stage in a movement that is really a Renaissance movement, and that the eighteenth-century theories of law as put forward by Wolff and Vattel and many of their followers was rather an intellectual interlude than a definite disturbance of the Renaissance movement. The pre-Renaissance jurisconsults from the twelfth to the fifteenth century, the Glossators[2] as they are called, had been engaged in the practical work of deriving from Roman law a working code that should destroy and replace the rapidly forming feudal law. With the Renaissance came Italian and French thinkers destined to do more than this—André Alciat (1492—1550) and Jacobus Cujacius (Jacques Cujas) of Toulouse (1522—1590). Joseph Scaliger said of these two men, "Ce qu'Alciat a commencé, Cujas l'a accompli." Alciat gave new life, new literary form, to the study of jurisprudence; but Cujas did more than this, he penetrated into the very spirit of Roman law. M. Lerminier, in his *Introduction générale à l'Histoire du Droit* (1829, cap. v. pp. 43–6), says of Cujas:

Ne craignons pas de le dire, il a aimé le droit romain en poëte, il a nourri le sentiment le plus profond de sa réalité, et, par l'énergie qu'il a déployée dans cette voie, il s'est fait le véritable fondateur de l'école historique du droit: c'est de lui que procède l'école historique allemande en ce qui touche le droit romain. . . . Son génie: c'est un esprit d'historien, c'est une imagination d'artiste; sous sa plume, tout est historique, individuel; aussi dans la volumineuse collection de ses œuvres vous ne trouverez pas un ouvrage qui ne soit un commentaire, une explication, une note sur les vestiges de l'antiquité. Cujas est le modèle de l'exégèse.

[1] *Histoire du Droit Romain au Moyen-âge* par M. de Savigny, traduite de l'Allemand sur la dernière édition et précédée d'une notice sur la vie et les écrits de l'auteur par M. Charles Guenoux (four volumes, one and two in one, Paris, 1839). But see also for the life of the jurist, *Friedrich Carl von Savigny: sein Wesen und Wirken*, von Professor Rudorff (Weimar, 1862), and a paper by Mr. William Guthrie in the *Law Magazine and Review* for May 1863.

[2] The jurisconsults of the school of Bologna, Accurse, Bartole, Vinerius, etc. (see *Nouvelle Biographie Générale*, tome xii. art. de *Cujas*, col. 592).

The learned writer (M. Rapetti) of the article on Cujas in the *Nouvelle Biographie Générale*, after quoting the opinion of M. Lerminier, adds this important reflection :

L'œuvre de Cujas ne fut pas seulement une explication plus habile de la loi romaine, un modèle d'exégèse, une révélation du vrai génie de la législation latine : en étudiant la loi romaine comme un objet de restauration historique, Cujas a obtenu un autre avantage ; le premier, il a suscité cette idée, à savoir qu'il est pour chaque civilisation une loi propre, et par là il a contribué à reléguer la loi romaine dans son antiquité vénérable ; il a émancipé de l'empire trop absolu de cette loi l'autonomie des nouvelles sociétés.

Cujas in the immense output of his work foreshadows the industry of Savigny. The six great folios of his collected works [1] overwhelm the mind. The first folio deals fully with four books of the Institutes of Justinian, twenty-nine titles from Ulpian, and with Julius Paulus. The second folio contains the brilliantly restored works of Papinian. The third gives us Paratitla in nine books of the Codicis Justiniani and a commentary on the three last books (x., xi., xii.) of the Codex, an exposition of the Novels and of the five books relating to Feuds, together with twenty-eight books of observations and emendations. The fourth folio gives us Paulus on the Edict and his books of Questions, and also the Responsa of Paulus, Neratius, Marcellus, Ulpian, Modestinus, and Scævola ; Notes on Modestinus and the works of Salvius Julianus. Folios v. and vi. contain the post-mortem publications (edited by T. Guerinus and C. Colombet), comprising Commentaries on no less than seventy-six titles of the Digest and innumerable notes on the Codex of Justinian and on Books ii., iii., and iv. of the Decretals of Gregory IX. Cujas was rightly called Jurisconsultus, for he placed Roman law on a new footing and brought it into line with the laws that it was destined to affect. This sturdy and genial scholar [1] and his bitter but brilliant opponent Hugues Doneau (Donellus) (1527—1591) were (in the matter of the study of law) the forerunners of Leibniz (1646—1716), whose juridical works mark a definite stage in the study of the law, works such as *Nova methodus discendæ docendæque* [2] *jurisprudentiæ* (Frankfort, 1667) and *Codex juris gentium diplomaticus* (1693) with its supplement *Mantissa Codicis gentium diplomatici* (1700) ; of the universal-minded Jean-Etienne Pütter (1725—1807), who at Marburg, Halle, and Jena became deeply proficient in classics, mathematics, philosophy, Roman, feudal, and public law, who lectured on law (1746) at Göttingen, who produced between 1776 and 1783 his *Bibliographica du droit public allemand*, who wrote his *Manuel de l'histoire d'Allemagne* in 1772 and his

[1] Jacobi Cuiacii, *IC. Operum quæ de jure fecit*, Paris, Apud Hervetum du Mesnil 1637. Four volumes in six, prefaced by a life of, and many epitaphs on Cujas.

[2] "Vir quadrato corpore, firmoque ac bene constituto, adeo ut ex eo manans sudor non insuavis esset odoris (quod ille naturæ beneficium cum Alexandro Macedone commune se habere ludens nonnumquam inter amicos jactavit), statura brevi, barba tum longa et cana, sed in juventate nigerrima, capillitio simili, colore candido, voce firma et clara" (*Vita*).

Développement historique de la constitution de l'empire d'allemagne in 1786. In Pütter we see the exact spirit of the historical school. A descendant of these men was Gustave Hugo (1764—1844), who deliberately based his methods on Leibniz and Pütter. He devoted much time to the historical documents and legislation connected with Roman law, and in 1788 published *Les Fragments d'Ulpien*, and was at once called to a professorship at Göttingen. Hugo classified law into persons (their state, their relations to the family and the city, their nature, character, and the method of acquiring and losing property) and the actions necessary for establishing or defending rights. This classification was adopted in the Civil Code. This was a philosophical classification. But Hugo did not neglect history. He divided Roman law into three periods: the period up to the xii. Tables, the Prætorian, and the Imperial periods. In 1790 he issued a History of Roman Law, in 1812 a Manual of Roman Law since the time of Justinian, and between 1818 and 1829 he published his Elements of the History of Roman Law up to the time of Justinian.[1] Through Hugo the whole historic school from the days of the Renaissance concentrated on Savigny.

At Marburg Savigny instantly made his mark as a teacher. We have the testimony of Jacob and Wilhelm Grimm (who both were pupils of his in 1802 and 1803) as to his capacity. Wilhelm Grimm wrote in his autobiography (pp. 170–1) as follows:

> Il me semble que ce qui attirait et captivait si puissamment ses auditeurs, c'était la facilité et la vivacité de sa parole jointes à tant de calme et de mesure. Les talents oratoires peuvent éblouir quelque temps, mais ils n'attachent pas. Savigny parlait d'abondance et ne consultait que rarement ses notes. Sa parole toujours claire, sa conviction profonde et en même temps une sorte de retenue et de modération dans son langage faisaient une impression que n'aurait pas produite l'éloquence la plus abondante, et tout en lui concourait à l'effet de sa parole. . . .
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> Il nous fit comprendre la valeur des études historiques et l'importance de la méthode. Ce sont là des obligations que je ne saurais trop reconnaître, car sans lui je n'aurais peut-être jamais donné à mes études une bonne direction. Pour combien de choses n'a-t-il pas éveillé notre intérêt! Combien de livres n'avons-nous pas empruntés à sa bibliothèque! Avec quel charme ne nous a-t-il pas lu quelquefois des passages de Wilhelm Meister, des poésies de Goethe! L'impression que j'en ai conservée m'est encore si présente qu'il me semble l'avoir entendu hier.

It is a charming picture, bringing out not only the learning and the clarity of the man but his humanity and charity. One impression conveyed by the lectures is the impression that all great lecturers indelibly impress on the minds of their pupils. Who that heard Maitland lecture can think of it as having been further away than yesterday? But Savigny was only twenty-three when he so impressed the great Grimm brethren!

Thirty years later he made a similar impression on M. Charles Guenoux. He wrote in 1839:

[1] The influence of Haubold (1766—1824) on Savigny must also be kept in mind.

Ce qui m'a surtout frappé, c'est la vivacité et la chaleur d'un cours qu'il répétait alors pour la vingt-cinquième fois. Son enseignement offre chaque année un intérêt nouveau, parce que chaque année on y retrouve le fruit de nouvelles études, les découvertes les plus récentes et le dernier état de la science. Aussi Savigny n'est-il pas insensible à l'intérêt qu'il excite dans son nombreux auditoire, et c'est ce qui lui fait continuer ses leçons quand des travaux plus importants peut-être sembleraient demander tout son temps. Sa parole abondante et précise éclaire si bien les matières les plus obscures que ses élèves n'en soupçonnent la difficulté, que si plus tard ils ont besoin de chercher une solution qui leur est échappée. Sa méthode est surtout remarquable lorsqu'à propos de matières controversées, il a occasion d'exposer des doctrines nouvelles. Sa parole, alors plus simple et plus grave, exprime une conviction profonde jointe à une modestie sincère; bien différent de ces professeurs qui, pour persuader leur auditoire, recourent à tous les artifices de l'avocat comme s'il s'agissait d'un plaidoyer, et font d'une question scientifique une question d'amour-propre et de personnes.

Savigny's success as a teacher did not check, nay, rather encouraged, his efforts as a student. His business as yet was not to write books but to study texts, and so to make possible a real revival in the scientific study of law. His master Hugo had already done much in this direction. M. Guenoux points out, as I have ventured to point out above, the value of Hugo's work. He found a lifeless and arbitrary school of Roman lawyers at work, men who never recognised the heredity, so to speak, of Roman law, men who had forgotten the lessons of the Renaissance.

Mais en 1788, Hugo appela l'attention sur Ulpien et commença une réforme semblable à celle que Cujas avait accomplie au seizième siècle. Animé du même esprit que ce grand homme, il replaça la science du droit sur ses véritables bases en lui restituant le secours de la philosophie et de l'histoire. Haubold et Cramer partagent avec Hugo la gloire de cette régénération de la science.

M. Guenoux goes on to protest against the belief in his time (1839) that German jurists fell into two schools, the historical school and the philosophical school. The distinction was merely one of *pace*; all followed the Cujacian School and refused to isolate jurisprudence from either philosophy or history. That may have been the case in 1839, but it certainly was not the case in the mid eighteenth century, when eminent jurists, men such as Wolff and Vattel, did in fact base new jurisprudence on *à priori* theories. The great triumph of the school of which Savigny is the shining and immortal light was the absolute destruction of the *à priori* method and the establishment on an impregnable basis of the vital and vitalising principles of the Renaissance.

In 1803 appeared Savigny's famous work on the Right of Possession, *Das Recht des Besitzes.* It is not possible (from considerations of space) here to supply an analysis of this treatise, but something must be said as to the scope and value of a work which Austin in his *Province of Jurisprudence Determined* (ed. 1832, App. p. xxxviii) declared to be "of all books upon law, the most consummate and masterly." It is divided into six books,

The first deals at length with the notion of Possession. Savigny says that "by the possession of a thing, we always conceive the condition, in which not only one's own dealing with the thing is physically possible, but every other person's dealing with it is capable of being excluded." The exercise of property takes place by virtue of this condition of detention. Savigny's object was to consider the rights of possession (*jus possessionis*), and not the right to possess (*jus possedendi*), and in the first book he defines the notion in form and in substance: "in *form* by describing the rights which require possession for their foundation, thus giving the meaning which the non-juridical notion of Detention acquires in jurisprudence so as to allow it to be understood as a legal entity, as Possession; in *substance* by enumerating the conditions which the Roman law itself prescribes for the existence o Possession, and thus pointing out the precise modifications under which Detention operates as Possession." The second book deals with the acquisition of possession, the third with its loss; the fourth treats of the interdicts that act as remedies for the protection of possession; the fifth deals with possession in relation to legal rights that are separated from actual property (*juris quasi possessio*), such as personal and real easements and superficies (buildings). The last book deals with a subject which was necessary from Savigny's point of view to complete anything like exhaustive treatment of so important a branch of law as the doctrine of Possession. He says: "The theory of Possession has been discussed in the first five books of this work without any reference whatever to anything that may have been incorporated into the Roman law in modern times; and this method of inquiry is always necessary when we do not desire, by confounding the old law with the new, to misunderstand both together." It is important not to pass over the historical question, for "of all the important errors which are commonly entertained as to the Roman view of Possession, there is perhaps not one which has not also been raised in the Canon and German law." He goes on to point out as to the notion of Possession that, while in Roman law it referred only to property and *jura in re*, subsequently and especially by the Canon law it was extended to every possible right, including rights of personal status and obligations.[1] Thus the Roman law has been expanded to meet new objects. The forms by which Possession is protected were also modified in post-Roman times. The Spoliatory Suits in so far as they applied to prædial servitudes were a legitimate extension of the Roman law to meet cases that had not arisen when that law was in its prime. Savigny agrees with Mühlenbruch that these suits in so far as they were legitimate were an extension of the interdict *de Vi* to a third *mala fide* possessor.

It is in this final passage of his work that Savigny turns on the opponents of the new jurisprudence, and gladly cites in his favour Mühlenbruch, the

[1] I may note here that an analysis and summary of Savigny's latest work—that on *Obligations in Roman Law* (1851–3)—was published by Mr. Archibald Brown in 1872.

author of the *Doctrina Pandectarum.* "An empty cry is often raised against the endeavours of what is called the historical school, to clothe every right exclusively with Roman forms, and thereby to do injustice to the original inventions of practice, and to the development of modern scientific intelligence." This attack from first to last irritated, by its obvious injustice, Savigny, and it is with a cry of delight that he shows how Mühlenbruch shares his views as to Spoliatory Suits: "Could this author have been a prophetic disciple of the German historical school?" Savigny goes on to show that the "absurd and vexatious" possessory suit used in Germany, Italy, Spain, and France from the thirteenth century down to his own day, a suit called *Possessorium summarium* or *summariissimum* (a suit in which he once acted as a judge), could not be fitted into any scientific evolution of Roman law. He adds: "In modern times undoubtedly legal rules have been adopted which were unknown to the Roman law; but the whole Roman theory is so far from being broken in upon by the above rules, that on the contrary they cannot be understood except by treating them as additions to the above theory [of possession], the validity of which is thereby clearly recognised." To-day in dealing with Savigny's work on Possession it would be wise to preface the study of it by a close perusal of Dr. Roby's lengthy treatment of the doctrine of Possession as understood in the times of the Antonines. Savigny would have appreciated the need for a full study of this elaborate portion of Dr. Roby's great work.

It is valuable to read what Savigny's pupil Guenoux said of his treatise on Possession in 1839:

> On sait que dans ce traité, après avoir passé en revue les quarante-quatre ouvrages qui composent la littérature de cette partie du droit, l'auteur s'est livré à une étude profonde et originale des textes, et qu'à l'aide de la philologie et de l'histoire, il a établi sur cette matière si difficile des doctrines entièrement nouvelles, ou plutôt a retrouvé les doctrines des anciens jurisconsultes romains; mais ce qu'on ne sait pas, c'est qu'un travail aussi immense a été achevé en cinq mois. Cette heureuse fécondité prouve que malgré sa jeunesse Savigny ne s'était pas trop hâté de produire; et cette fécondité ne s'est pas tarie, parce que, semblable aux grands fleuves, il avait attendu pour couler que sa source fût pleine.
>
> L'histoire et la science du droit ont certains problèmes qui sont éternellement livrés aux disputes des hommes, et dont il paraît impossible de donner une solution définitive. Dans la polémique à laquelle ces questions ont donné lieu, Savigny n'a pas montré moins de sagacité que de candeur et de bonne foi, en rétractant ses opinions dès qu'un de ses adversaires en avançait une plus probable. Mais il est une foule de points où Savigny a eu la gloire de réunir tous les suffrages, et son livre, quoique purement théorique, a déjà eu la plus heureuse influence sur la pratique du droit en Allemagne, influence destinée à s'accroître, car pour la possession comme pour tant d'autres, le droit romain est souvent la raison écrite, la loi véritable, c'est à dire l'expression *des rapports nécessaires qui dérivent de la nature et des choses.*

This remarkable testimony to the gifts, the serious nature, and the abiding influence of Savigny written in 1839 might have been written to-day,

for the greatness of Savigny increases with the passing years. The vigour of his patriotism and his efforts on the behalf of the poor (as in the cholera outbreak of 1831) were scarcely less noticeable than his efforts as a teacher.

In 1804 Savigny married Fräulein Kunigunde Brentano, daughter of a Frankfort banker, a member of a family well known in German literature from the correspondence between her brother and sister, Clemens Brentano and Bettina von Arnim, with the poet Goethe. This marriage was an ideal union, since the wife, herself an orphan, had every thought in common with her husband. There were six children of the marriage. Two of them died in infancy. The only daughter married M. Constantin de Schinas, Minister of Education at Athens, where she died in 1835. She was full of brilliant promise, and her early death was the abiding grief of Savigny's life. It is said that the enormous work known as the *System of Modern Roman Law* was undertaken to help him to pass through this sorrow.

Shortly before his marriage Savigny had severed his connection with the University of Marburg, and, refusing tempting offers from the Universities of Heidelberg and Greifswald, he set out with his wife on a tour of research to certain famous libraries, to the libraries of Heidelberg, Stuttgart, Tubingen, Strasbourg, and Paris. In Paris he had the misfortune to lose (by robbery) all the material that he had collected through Germany. He called his old pupil Joseph Grimm to his aid, and with his help and the help of his wife and one of her sisters they conquered the abundant French manuscript material, including the unpublished and almost indecipherable letters of the great Cujas. In 1808 he took up for a year and a half professorial work at the University of Landshut. When he left for Berlin the grief of the students was unaffected. His sister-in-law Madame von Arnim, who was staying with him at the time of the change, wrote to Goethe:

Que Savigny soit savant tant qu'il voudra, la bonté de son caractère surpasse encore ses qualités les plus brillantes. Les étudiants l'adorent, ils sentent qu'ils perdent en lui un bienfaiteur. Les professeurs le chérissent également, surtout les théologiens. . . . Savigny avait donné une vie nouvelle à l'université, qu'il avait su réconcilier les professeurs ou du moins calmer leurs inimitiés, mais que son influence bienfaisante s'était fait surtout sentir aux étudiants dont il avait augmenté la liberté et l'indépendance. Je ne saurais vous exprimer le talent de Savigny à traiter avec la jeunesse. Les efforts, les progrès de ses élèves lui inspirent un véritable enthousiasme; il se sent heureux s'ils réussissent à traiter les sujets qu'il leur propose; il voudrait leur ouvrir le fond de son cœur; il s'occupe de leur sort, il pense à leur avenir, et leur trace la route qu'éclaire son zèle bienveillant. On peut dire de Savigny que l'innocence de sa jeunesse est devenue l'ange gardien de sa vie. Le fond de son caractère est d'aimer ceux auxquels il consacre toutes les forces de son esprit et de son âme, et n'est-ce pas là ce qui met le sceau à la véritable grandeur? La simplicité naïve avec laquelle sa science descend au niveau de chacun le rend doublement grand.[1]

On the foundation of the University of Berlin (now celebrating its

[1] Goethe's *Briefwechsel mit einem Kinde*, vol. ii. pp. 171–188 (2nd ed.)

centenary) in 1810, one of the first fruits of the great educational campaign that sprang out of the disastrous field of Jena, Wilhelm von Humboldt, the head of the new Prussian educational system, offered Savigny the chair of law, which, chiefly from patriotic motives, he accepted. The jurist held this chair until 1842. It was his practice to lecture on the Pandects (excluding the law of succession) in the winter Semester and the Institutes in the summer Semester. He also lectured on Ulpian, Gaius, and the Prussian Landrecht. Among his pupils at Berlin were Hollweg, Klenze, Göschen the editor of Gaius, Blume, Rudorff, Keller, Dirksen, Barkow, Böcking, and Puchta. He also sat on the University Appellate Tribunal known as the Spruch-Collegium, to which questions of law were referred for decision by other tribunals. At Berlin Savigny became an intimate friend and pupil of the great Niebuhr, whose mind and character so closely coincided with his own, and who pays him a just tribute in the preface to his History of Rome.

In 1811 Savigny was elected a member of the Berlin Academy, a precedent followed by most of the Academies of Europe in later years, and to this body he read papers on the Roman written contract, on the Voconian law, on the lawsuit relating to the loan of money by Marcus Brutus to the town of Salamina, on the Protection of Infants and the lex Plætoria, on the Rights of Creditors under the old Roman law, on the History of the Nobility in Modern Europe.

In 1814 the jurist (who was then acting as law tutor to the Prince Royal of Prussia) issued a brief work entitled *De la Vocation de notre siècle pour la législation et la science du droit*, in which he closely and brilliantly criticised the proposed Civil Code as not in fact adopting, as it proposed to adopt, the principles of the Roman law at all. In 1817 he was given the honorary title of Geheimer Justiz-Rath in recognition of his work on the Council of State.

In 1819 he was appointed Counsellor to the Court of Revision and Cassation at Berlin which had been formed to take the place of the Courts at Düsseldorf and Coblentz. This practical work was of the greatest benefit to his juridical studies. A little later a nervous breakdown, the result probably of years of close work, became imminent, and in fact from 1822 to 1828 he was subject to a form of nervous illness that rendered at times all work impossible. M. Guenoux attributes to this illness the delay in the publication of the History of Roman Law in the Middle Ages.[1] The first volume appeared in 1815, but the sixth was not issued until 1831.

Savigny laid the greatest stress on the necessity of tracing the course of Roman law through the Middle Ages. He writes to M. Guenoux: "Ignorer ce que les siècles intermédiaires ont ajouté au droit romain primitif est absolument impossible, tout ce que nous apprennent nos professeurs et les livres modernes en est imbu." No student of, let us say, Bracton could doubt

[1] *Geschichte des römischen Rechts im Mittelalter* (6 vols. 8vo, Heidelberg, 1815–31). A second edition began to be issued from Heidelberg in 1834. The last and *seventh* volume appeared in 1851, with a preface dated in May of that year.

this, and Maitland in his brilliant papers on "The Beatitude of Seisin" (*Law Quarterly Review*, vol. iv.) has shown how the doctrine of possession in English law completely changed as the pressure, so to speak, of the Roman lawyers died away. Consequently Savigny determined to deal exhaustively with the history of Roman law in the Middle Ages. His great work falls into two parts: the period before and the period after the foundation of the School of Bologna about the year 1100. In the first two volumes he deals with the earlier period, first in general and then in detailed form. He begins with the sources of law and judicial organisation in Rome and the provinces in the fifth century. He follows this by treating the same themes in relation to the states that arose on the ruins of the Western Empire. In the second volume he deals with Roman law in the kingdoms of Burgundy, of the Visigoths, in the German Empire, in Saxon England, in the kingdom of the Ostrogoths, in Italy under the Greek domination and under the Pope and the Emperor in Lombardy. He finally shows the part played by the Church in preserving the Roman law. In the third volume he collects much material on the literature of Roman law after the foundation of the School of Bologna, and has an important chapter on the history of the European Universities. Indeed this general volume dealing with the history of Roman law from the twelfth century to the end of the Middle Ages is professedly a literary history of law, since Savigny found that such a history was indispensable for the comprehension of the evolution of the law. He says on this point:

> Le but de toute composition historique est d'offrir une représentation complète et vivante du passé. Plus ce passé est éloigné, moins on a de moyens d'arriver à ce but. Ainsi l'on découvre un détail, mais on ne sait comment le rattacher à l'ensemble, ou il lui manque cette lumière qui éclaire un fait historique comme un fait contemporain. Si le but de l'histoire ne peut être atteint complètement, on ne doit rien négliger de ce qui nous en rapproche; l'on ne doit donc rejeter aucun détail comme peu important en lui-même, ou comme étranger à l'objet direct de notre étude.

So having given us the means of studying the legal literary history of the period, a bibliography of the subject (with full reference to the work of, amongst others, Johannes Andreæ of Bologna, Pastrengo the friend of Petrarch, Severinas, Trithemius, Diplovataccius, Johann Fichard, Benavidius, Pancirolus, Taisand: we miss in this place the name of Aymarus Rivallius, whose important history of the Civil Law in five books was published at Mainz in 1539[1]), and treated of the Universities, he passes on to the legal sources possessed by the Glossators and considers at length their work. In the fourth volume we get the elaborate detail foreshadowed in the previous volume. Here we can read at large in more than five hundred closely printed pages of Irnerius, of the four famous jurisconsults of Bologna

[1] There is a copy of this work in the fine civil law section of Lincoln's Inn Library. Savigny gives a brief note on Rivallius in his fourth volume (pp. 256–7) and declares this work to be "remarquable, malgré ses défauts, comme le premier qui ait été fait sur l'histoire du droit."

(Bulgarus, Martinus, Jacobus, and Hugo), of Rogerius the pupil of Bulgarus, Placentinus, Johannes Bassianus, Pillius, and many other Glossators including the famous Vacarius and scarcely less famous Azo. In the middle of the thirteenth century a new and dismal era opened for the study of law: the text was swallowed up in detailed comment and the true treatise disappeared. Indeed the School of the Glossators was dead. In the fourteenth century fortunately a partial revival of scientific method came which carried the science of law on to the time of the Renaissance, when it was able to assert its place in the thought of the world. Savigny traces in detail this long movement, and illustrates each step with ample reference to the works of the jurisconsults of the fourteenth and fifteenth centuries. In this work he threw open a field of research that will occupy jurists for centuries to come. Maitland's work in England is but a sample of what has to be done throughout Europe.

Savigny's work on *The Vocation of our Age for Legislation and Jurisprudence*, issued in 1814 and passing to a second edition in 1828, was a notable publication. It was neither more nor less than an attack on the system of the Code imposed upon Europe. Napoleon's Code he declares "served him as a bond the more to fetter nations: and for that reason it would be an object of terror and abomination to us, even had it possessed all the intrinsic excellence which it wants." He attacks the Code, however, chiefly from the point of view of a juridical thinker, since at the overthrow of Napoleon in 1814 his Code, which had been in force "in parts of Bavaria, Hesse Darmstadt, the Rhenish provinces of Prussia, the kingdom of Westphalia, Baden, the Hanseatic towns, and some other ultra-Rhenish provinces," was discarded by all Germany with the exception of the Rhenish provinces. The danger from a foreign Code no longer existed; but there still existed the danger of a Code at all. The eminent lawyer Thibaut of Heidelberg advocated the establishment of a German Code, and Savigny determined to throw his great weight in the other scale and restore a natural evolution of law. He attacked the demand for a Code first on the ground that the times being as they were, and the preparation for a Code (thanks to the paucity of great German jurists in the eighteenth century) inadequate and the language juridically undeveloped, it was not then practicable to construct a Code; and secondly on the ground that the three great existing Codes—the Code Napoléon, the Prussian Landrecht, and the Austrian Gesetzbuch—proved that in practice Codes were not successful. Savigny's attack on the Code Napoléon was just, though he admits that its form was embittered by patriotic feelings. He says:

> The Revolution, then, had annihilated, together with the old constitution, a great part of the law; both, rather from a blind impulse against everything established, and with extravagant senseless expectation of an undefined future, than in the hope of any definite improvement. As soon as Napoleon had subjected everything to a military despotism, he greedily held fast that part of the revolution which

answered his purpose and prevented the return of the ancient constitution,—the rest, which all were now sick of, and which might have proved an obstacle to himself, was to disappear; only this was not altogether practicable, as the effects of the years that had elapsed upon the modes of thought, manners and feelings of the people, were not to be effaced. This half-return to the former state of tranquillity was certainly beneficial, and gave the Code, which was founded about this time, its principal tendency. But this return was the result of lassitude and satiety, not the victory of nobler thoughts and feelings; nor, indeed, would there have been any opening for such in that condition of public affairs which, to the plague of Europe, was preparing. This want of a sound basis is discernible in the discussions of the *Conseil d'État*, and must impress every attentive reader with a feeling of despondency. To this was now added the immediate influence of the political constitution. This, when the Code was framed, was, in theory, republican in the revolutionary sense; but all, in reality, inclined to the recently developed despotism. The elements of uncertainty and change were consequently mixed up with its fundamental principles. Thus, for example, in 1803, Napoleon himself, in the Council of State, pronounced those same Substitutions to be injurious, of a bad moral tendency and unreasonable, which were re-established in 1806, and, in 1807, adopted into the Code. But as regards the state of public feeling, a far worse consequence of this quick succession was, that the last, so often sworn to, object of belief and veneration was, in its turn, annihilated, and that expressions and forms came more and more frequently into collision with ideas, whereby, in the greater number, even the last remains of truth and moral consistency were necessarily extinguished. It would be difficult to imagine a state of public affairs more unfavourable for legislation than this.[1]

Turning to the technical side of the Code, Savigny argues that the Conseil d'État could have, from its ignorance of general juridical doctrines, little influence on the Code. It was, as a matter of fact, the work of jurists who, so far as Roman law was concerned, necessarily based their work upon Pothier. Dupin declared that three-fourths of the Civil Code was literally extracted from his treatises. "A juridical literature in which he stands alone, and is almost revered and studied as the source, must, notwithstanding [the real value of Pothier], be pitiable." Savigny proceeds to eviscerate the framers of the Code, Bigot Preameneu, Portalis, and Maleville. Certainly they were not supremely intelligent jurists. The results of their work were bad in the extreme. In the selection of subjects "the most palpable defects are to be found by wholesale." But worse was to follow. "Far more important in this respect, and much more difficult in itself, is the selection of rules on the subjects actually treated of; consequently the finding of rules, by which particular cases are to be governed in future. Here the object was to master the leading principles, on which all certainty and efficacy in juridical matters depend, and of which the Romans afford us so striking an example. In this point of view, however, the French work presents a melancholy spectacle." The fundamental and precise notions—

[1] I use the translation made from the 1828 edition by Mr. Abraham Hayward in 1831. (London: printed but not for sale.) A copy, here used, is in the Acton Library at Cambridge (C. 48. 929). There is another copy in the Middle Temple Library.

the rights of things and of obligations—upon which the Roman law of Property depends are in the Code vague and ill understood, and this leads to a confusion of ideas which in the form of a Code is dangerous to the public. Last, Savigny attacks the provisions in the Code for dealing with cases that are not in fact covered by a precise section of the Code. It was not possible to regard the rules dealing with such cases as organic developments out of the Code—with which we may compare, though Savigny does not give the parallel, the growth of the English common law to meet new cases—since the Code itself had no organic unity. The Code is only a mechanical mixture of the Revolution and pre-Revolution laws, and the mixture is not even a logical whole, a formal unity that might be logically developed to meet new cases. Consequently the supplemental rules had to be supplied from outside sources, such as (that vague thing) the law of nature, the Roman law and local pre-existing law, and the general theory of law. This introduction of an abrogated law into the Cour de Cassation is a real evil. A practice of the Courts could grow up, but no real juridical growth. The rules could indeed be applied at the tyrannical discretion of the judges. This indictment of the French Code, if we except the political note at the beginning, is effective in the extreme, and should be considered in every step towards codification. Before considering his general notion of legal reform it will be well to say something of Savigny's criticism of the German and Austrian Codes.

Savigny's criticism of the Prussian Landrecht designed by Frederick II. in 1746 is not less penetrating, though his natural if somewhat unjudicial hatred of France and all her works induces him to attribute to the Prussian jurists a far nobler outlook than that which inspired Napoleon and the unhappy framers of the Code. We may doubt if Suarez was a greater man than Pothier, or Volkmar (or Pachaly) than Portalis, but in any event Savigny declares that if "we regard the composition of the Landrecht, it confirms my opinion, that no Code should be undertaken at the present time." Frederick II. designed a Code that should abolish judge-made law altogether; but, in fact, the Landrecht in its latest form gave the judge full powers of interpretation. But still this was, after all, only for particular cases. "With the Romans all depends on the jurist, by his thorough mastery of the system, being placed in a condition to find the law for every case that may arise. This is effected by the precise individual perception of particular legal relations, as well as by the thorough knowledge of the leading principles, their connection and subordination; and where, with them, we find law cases in the most restricted application, they notwithstanding constantly serve as the embodied expression of the general principle." This was not the case with the Landrecht, the provisions of which "neither reach the height of universal leading principles, nor the distinctness of individuality, but hang wavering between the two, whilst the Romans possess both in their natural connection." Savigny goes on to criticise the German language, "which,

generally speaking, is not juridically formed, and least of all for legislation." The French language, he adds, has a great advantage in this respect: that it had not been better used "is accounted for by the low state of knowledge" in France. The Austrian Gesetzbuch was begun in 1753; by 1767 the groundwork of the Code, "a manuscript work of eight large folios, mostly extracted from the commentators on the Roman law," was complete. This was abstracted by Horten, digested into code form by Martini, published, submitted to the provincial authorities and the Universities, and, slightly revised, issued as the Gesetzbuch in three parts, covering 561 widely printed pages. The Empress Maria Theresa directed the draughtsmen to employ "natural equity" as well as Roman law. In fact, there was no attempt to cover all particular cases. The notions of legal relations were defined, and the most general rules laid down. Savigny considered these notions as too general and undefined, and often based on an imperfect appreciation of the Roman authorities. The Roman clarity of definition is absent. Moreover, the practical rules of the Gesetzbuch are as incapable as the rules of the Code Napoléon of meeting particular cases. The Gesetzbuch falls back for the solution of particular cases on cases analogous to those provided for, and on "natural law"; the principle carries one but a short way, and the use of "natural law" is "fraught with danger to the administration of justice." The Gesetzbuch, like the Code and the Landrecht, therefore confirms Savigny's argument "that the present time has no aptitude for the undertaking of a Code." The unsuccess of three such efforts shows that "there must be some unsurmountable obstacles in the juridical state of the whole age.'

What then, asks Savigny, are we to do when there are no Codes? He would hold to the "same mixed system of common law and provincial law, which formerly prevailed throughout the whole of Germany . . . provided [that] jurisprudence does what it ought to do, and what can only be done by means of it." We have inherited "an immense mass of juridical notions and theories. . . . At present, we do not possess and master this matter, but are controlled and mastered by it, whether we will or not. This is the ground of all the complaints of the present state of our law, which I admit to be well founded: this, also, is the sole cause of the demand for Codes." Savigny adopts the Hegelian position: "It is impossible to annihilate the impressions and modes of thought of the jurists now living,—impossible to change completely the nature of existing legal relations; and on this twofold impossibility rests the indissoluble organic connection of generations and ages; between which, development only, not absolute end and absolute beginning, is conceivable." Savigny with a brilliant flash of juridical insight turns the indestructibleness of legal notions to permanent gain. He says: "There is consequently no mode of avoiding this overruling influence of the existing matter; it will be injurious to us so long as we ignorantly submit to it; but beneficial if we oppose to it

a vivid creative energy,—obtain the mastery over it by a thorough grounding in history, and thus appropriate to ourselves the whole intellectual wealth of preceding generations." In any other process the law may lose its consciousness of nationality, and only through history "can a lively connection with the primitive state of the people be kept up; and the loss of this connection must take away from every people the best part of its spiritual life." Savigny goes on to say that the object of the strict historical method of jurisprudence "is to trace every established system to its root, and thus discover an organic principle, whereby that which still has life may be separated from that which is lifeless and only belongs to history." The importance of Roman law is that "by reason of its high state of cultivation" it serves as a pattern for the labours of the modern jurist. The importance of the local or customary law is that "it is directly and popularly connected with us." The modifications of these two primitive systems are important as showing how both Roman law and local law have varied under the stress of actual needs and the application of legal theory. Roman law must be grappled with at the root; we must enter into the minds of the Roman jurists if we are to appreciate it and apply it to modern uses. Do not be afraid because the text-books are as yet imperfect: "Everything which Thibaut here says of the uncertainty of our text-books is equally applicable to the Scriptures. In these, also, the critic will never find an end; but he who, on the whole, is able to find nourishment and joy in them, will certainly not be troubled upon that account." Savigny's appreciation of the spiritual weakness of the Higher Criticism of the Bible then growing into a force of negation is an important phase of his high and spiritual nature.

Savigny, with his habitually long vision, insisted that "this diffusion of legal science ought to take place, not only amongst the jurists of the learned class, the teachers and writers, but even amongst the practical lawyers." He demands the approximation of theory and practice, and applauds a proposal for free communication between the Faculties of Law and the Courts. Mr. Hayward in a note (p. 149) points out that "from the time of Maximilian, the immediate predecessor of Charles V., the Law Faculties, consisting of the Professors of the German Universities, have constituted Courts of Appeal in the last resort. The appellants, I believe, may select any University they please; for instance, a case decided in Hanover may be sent to a Prussian University." It will be remembered that Savigny's father sat on one of these University Courts. But Savigny says that in his time these University Courts had become even more mechanical than the regular Courts.

Savigny having shown how the texts or legal authorities can be based "on a profound and comprehensive science," and how the judges may be made efficient, proceeds to deal with the third necessity of an efficient legal system, good procedure. To reform procedure, he says, we must have recourse to the

legislature. The legal system so established would moreover derive great assistance from the legislature, which would settle disputed points of law (acting through Orders of Court) and record old customs that have received validity in practice. Then at last the historical matter of law will be transformed into national wealth, and the nation will possess a national system of its own and not "a feeble imitation of the Roman system." Savigny goes on to ask what is to be done under these circumstances with the Landrecht and the Gesetzbuch. It seemed clear that no "real, living jurisprudence" could be founded upon any one of the three Codes or upon the then proposed new German Code. The study of law must go on as if the Codes did not exist; the study, that is, of both the common law and the provincial laws; it must go on in the Universities, and there must be intimate intercourse between all the German Universities.

No one can read Savigny's attack on the Code movement of his age without feeling the immense weight that is due to his opinions. Step by step he urges an unanswerable argument and lays the foundation of the only true system of practical jurisprudence. To-day this work is of peculiar value and interest, for on the one hand we have England, a country that has in fact followed, unconsciously enough but in most exact detail, the lines of development suggested by Savigny, and on the other hand we have the rest of Europe under the dominance of that very system of Codes denounced by the greatest jurist that Europe has produced. Who is right? Savigny, England, and the Anglo-Saxon nations throughout the world, *or* Napoleon and his Europe?

Savigny's Preface, written in September 1839, to his great work on *The System of the Modern Roman Law* (in eight volumes, five published in 1840–1 and the rest in 1847–9) amplifies with even a broader outlook the views expressed in the first edition of *The Vocation of our Age for Legislation and Jurisprudence* (1814) and repeated in the second edition (1828) of that finely critical essay. The material for the work on *Modern Roman Law* had been "gradually collected and worked up in the courses of instruction" delivered by Savigny for a period of forty years, and the work itself is his ripe and incomparable judgment on the subject. Pleading as he does for "the continuous cultivation" of the science of law, he feels the danger of the accumulation of material.

> To prevent this danger we must desire that from time to time the whole mass of that, which has been handed down to us, should be newly examined, brought into doubt, questioned as to its origin. This will be done by placing ourselves artificially in the position of having to impart the material transmitted, to one unskilled, doubting, controverting. The fitting spirit for such a testing work is one of intellectual freedom, independence of all authority; in order, however, that this sense of freedom may not degenerate into arrogance, there must step in, the natural fruit of an unprejudiced consideration of the narrowness of our own powers, that wholesome feeling of humility which can alone render that freedom of view fruitful of performances of our own. From two wholly opposite standpoints, we are thus

directed to one and the same need in our science. It may be described as a periodically recurring examination of the work accomplished by our predecessors, for the purpose of removing the spurious, but of appropriating to ourselves the true as a lasting possession, which will place us in the condition, according to the measure of our powers in the solution of the common problem, of coming nearer to the final aim. To institute such an examination for the point of time, in which we actually are, is the object of the present work.

He goes on to defend "the historical school" (of which he was certainly the most distinguished representative) from the unjust criticism to which it had been subjected. The aim of that school was not (and one may add is not, for to-day the historical school is one of the most important agents of thought in Europe) to "subject the present to the government of the past." The historical view of legal science (and we may say of any science) "consists in the uniform recognition of the value and the independence of each age, and it merely ascribes the greatest weight to the recognition of the living connection which knits the present to the past, and without the recognition of which we recognise merely the external appearance, but do not grasp the inner nature, of the legal condition of the present."

Savigny's object was certainly not to assign an "immoderate mastery" to Roman law, but he claims that a thorough knowledge of that law is indispensable for a comprehension of existing legal conditions. The natural unity between the theory and the practice of law finds its expression in the Roman law, and the study of that law can do much to avoid the disastrous divergence of the practical and the theoretical. But to make the Roman law produce this result we must turn, not to summaries or general principles, but to the writings of the Roman jurists. Such a study will eliminate from law subjective and arbitrary aberrations, and give to law new life even where it exists in the form of a Code. "This is markedly shown by the example of the modern French jurists who, often in a very judicious manner, illustrate and complete their Code from the Roman law." Even in the case of the Prussian Code, if there could be at least a partial re-establishment of "the dissolved connection with the literature of the common law, the result now could be nothing but the arising of a beneficial influence upon practice, and the mischiefs, so sensibly felt at an earlier time, would certainly not recur." The effort to employ Roman law "constantly as a means of culture for our own legal condition" is no depreciation of "our time and our nation," for in view of the enormous accumulation of material we have a greater task than lay before the Roman jurists and we may rightly use their methods. "When we shall have been taught to handle the matter of the law presented to us with the same freedom and mastery as astonishes us in the Romans, then we may dispense with them as models and hand them over to the grateful commemoration of history." Till then we must use a means of culture that we are incapable at present of creating.

With such views in mind, Savigny proceeds to his critical and systematic

treatment of Roman private law as it existed in his time. He searches out and rules out all that is dead in Roman law, and then he proceeds to demonstrate the great and living unity of what remains. "In the richness of living reality, all jural relations form a systematic whole." His business is to demonstrate this deep and fundamental relationship, which is apt to disappear when particular fields of law are momentarily in view. The fact of this relationship causes him to give in 1839 an "entirely different shape" to the doctrine of Possession from that presented by him in 1803. For this we must get back to the old jurists. From them we may secure "a vitalising and enriching of our own juristic thought obtainable in no other way." Savigny says that the work he here performs he would have performed more thoroughly had he begun it in his earlier years. He would have checked his system by exegesis beginning from the Glossators and on through the French school, and by practical examples also derived from the authors of the numerous *Consilia responsa*, etc., also beginning from the Glossators. In this way his system would be checked in detail, and he suggests that some successors of his might undertake this work and give it literary completeness. With some pathos he suggests that it might be done piece by piece. He does not anticipate the coming of giants, of Cujas or another. So he gives his work to the world. The first volume deals with the problem before him, with the nature of law sources in general, with the sources of the modern Roman law, with the interpretation of written laws. The second book deals entirely with jural relations, and the first chapter treats of the nature and kinds of the jural relations. Up to this point we have a translation by Mr. William Holloway, formerly a judge of the Madras High Court. This was issued at Madras in 1807. The eighth volume of the work, a complete treatise on the conflict of laws and private international law, was translated by Mr. William Guthrie of the Scots Bar and published in 1869 (2nd ed. 1880) by Messrs. Clark of Edinburgh. In 1884 Sir William (then Mr.) Rattigan published a translation of the residue of the second book, in which are elaborately discussed "persons as subjects of jural relations." This translation exhibits the thoroughness of Savigny's investigations and his power of systematic grouping of material. For the purposes of this article it is not possible or desirable to discuss the details of a work such as this, with its close investigation into the facts and doctrine of legal capacity, of *Capitis Deminutio* and juristical persons, or as we should say artificial persons (such as corporations) possessing jural relations.

The pressure of public judicial and diplomatic work had long burdened the jurist. Dr. Reddie, in his very admirable volume entitled *Historical Notices of the Roman Law and of the Recent Progress of its Study in Germany*, published at Edinburgh in 1826, a work that traces in valuable detail, based on personal knowledge, the universal activity of the study of law throughout Central Europe at this date, says of Savigny: "A man of genius, he is not only a celebrated professor and judge, but a profound statesman. . . .

Unfortunately for the study and the science in general, the time of von Savigny is too much occupied with the discussion of petty disputes in a kingdom, the attention of whose government is almost entirely directed towards military affairs, and where his labours, however highly valued, can be of little service to mankind at large" (pp. 111–114). It is certain that Savigny did not look at his judicial work in this light. He was descended from a family of soldiers, diplomatists, and lawyers, his son was an eminent diplomatist, and he continually dwells on the need for the closest touch between the theory and the practice of law. As a judge he certainly gave practical law something, but as a jurist there can be little doubt that he gained immense power from it. It kept his theory of law alive, and made the jurist feel in the most vivid sense the reality and the personal importance of his speculations. So important did he regard this class of work that in 1842 he resigned his chair at the University of Berlin and became the Prussian Minister of Justice, a post which he filled with rare ability until the year 1848, when the wave of revolution passed across Europe. In that year he retired and set to work to revise his publications and papers. Fortunately he was allowed long leisure in which to fulfil this important work of revision. Many of his papers are to be found in the *Zeitschrift für historische Rechtswissenschaft*, the journal for historical jurisprudence which he founded with the help of Eichhorn and Göschen in 1815, and superintended for many years.[1] Before the great jurist died at Berlin on October 25, 1861, in his eighty-third year (his devoted wife his helper to the last), he could look back over a long vista of accomplished work, and could believe that the future of his beloved science was assured.

It is not possible even yet, half a century after the death of Savigny, to indicate fully his work in the history of the evolution of law, his place among the great jurists of the world. The depository, so to speak, of so many centuries of juristic activity, the forerunner of detailed juristic investigation of so manifold a character, it is perhaps as easy to undervalue as to overvalue his services to a science that mysteriously superintends the health and welfare of the social world. For my own part (but I write with hesitation as one who dares not claim to have entered in any real sense into even a minute portion of the fruits of his cheerfully titanic labours), for my own part I should be tempted to call him the Newton or the Darwin of the science of law. His achievements resemble the achievements of both of these mighty men. He found, as Newton found, a world of phenomena, in his case of juristic phenomena, and he wrestled with it in the true hardihood of the Renaissance through the dark night until the Spirit of the Law cried out, "Let me go, for

[1] In October 1850, on the occasion of the universal congratulations upon the completion of the fiftieth year of his doctorate, he issued as a thank-offering and memorial a collection of all the detached papers he had written in that period. The volume was entitled *Vermischte Schriften*. The only omission from it was a review of Glück's *Intestaterbfolge* which appeared in 1804 in the *Jenaische Literaturzeitung*. (See *Law Magazine and Review*, May 1863.)

the day breaketh." It was reserved for Savigny to bring the daylight of the Renaissance to the science of law. He showed us that law itself is subject to law, that it is no arbitrary expression of the will of a law-giver, but is itself a thing obedient to a cosmic process. To show that law is itself the expression of a juristic process that runs through the ages was in itself an achievement of the highest order; but to go on to trace, as Savigny traced, what we may call the natural history of law, to trace its organic growth as a living thing, evolving with the evolutions of races and kingdoms and tongues, was a still greater triumph. When we think of the apparently chaotic mass of material into which Savigny introduced an evolutionary law, or, rather, indicated the processes by which, operating through and in this material, juristic forces adjusted themselves to the needs of successive ages, it is difficult to resist the decision that he stands in the forefront of European thinkers. It is true that his guiding star in his investigations and reductions was the Roman law, but he himself fully realised the importance of other systems of law, the common laws or general and particular customs of European nations, in arriving at general results. But while individual nations had their respective systems of common law, it must be remembered that, down to the Renaissance at any rate, Roman law was the common law of all Europe, a general system of law upon which local systems were more or less successfully grafted. To trace the natural history of Roman law in Europe was the only possible method of arriving at the secret that underlay the whole evolution of law. When once the secret was disclosed, then it was time enough for Savigny himself and his successors to retrace the ground, to reinvestigate sources, to turn the newly discovered processes on those sources, and so to bring into the field of juristic science material of every kind that, until then, had seemed beyond the control or operation of any general law of evolution.

There is no need to claim too much for Savigny. As we have seen, he was not the inventor of the historic method, nor can he claim to have carried that method to its scientific height. Newton and Darwin entered into the ideas and labours of their predecessors, and their supreme conceptions have certainly been applied with a thoroughness that would possibly have astonished the masters themselves. So it was and has been with Savigny. Of his forerunners we have seen something; and even while he was toiling, Semester by Semester, in the congenial work of teaching and judging at Berlin, his fellow-workers and pupils were applying his methods and were methodising material to his hand. And his and their successors in Germany and England and France have gone far. His friend Niebuhr in 1816 discovered in the chapter library at Verona the priceless palimpsest manuscript of the Institutes of Gaius, the work on which the Institutes of Justinian were based. In 1820 Savigny's pupil Göschen published the first edition of this manuscript. Another pupil, Blume, obtained some further readings from this almost indecipherable palimpsest in 1822–3, and these

were included in Göschen's second edition of 1824. The study of this manuscript has gone on until quite recently. Dr. Roby tells us that "Wilhelm Studemund in 1866–68 made a fresh copy of the MS., containing much that had not been previously read, and he published a kind of *facsimile* in 1874, and in conjunction with Paul Krüger a very careful and convenient edition in 1877. In 1878 and 1883 Studemund re-examined the MS., and thus obtained additions and corrections of some importance, which were published in subsequent editions of his and P. Krüger's book." Here, then, was one line of investigation worked out that must have been after the very heart of the master. Another investigation, of perhaps even greater importance from the point of view of the history of evolution of law, has been the work, one might almost say the life-work, of that eminent English scholar Dr. H. J. Roby in reconstructing, with an infinitude of labour that recalls the toil of Cujas and of Savigny, Roman Private Law as it existed in the times of Cicero and of the Antonines. It is a marvellous piece of work, and gives us substantially, if not actually clear of "Byzantine modifications," Roman Private Law as it stood at the time of its highest development (say 161 to 228 A.D.). Savigny would have been the first to recognise the supreme importance of establishing this basis from which to trace the long centuries of modification, down even to the law of Holland or Scotland, Ceylon, Egypt or the Cape to-day; and he, too, would have been glad to know of the substantial assistance afforded to Dr. Roby by German scholars, and probably would have enjoyed some of Dr. Roby's not unkindly criticism of certain modern German critical methods. Beside Roby's work must be placed the tireless labours of the immortal Mommsen and his school in unravelling the texts of "law-books, authors, and inscriptions." No doubt vast fields lie open for future scholars in the period behind the Antonines, though much work has already been done in those dark ages. And, again, the field of Roman law in the Middle Ages calls for workers. Maitland's brilliant treatment of Bracton shows how much remains to be done to bring into cultivation the immense field over which Savigny cast his measuring-rod. This is not the place in which even to indicate the area of work, or to mention the work now in progress. But that work and the appreciation of its intensity and its range by great modern scholars show how thorough and how sound were the principles that Savigny laid down. His actual work was titanic, but it is plain enough (now that he has given us the guiding principle) that he but threw open an almost illimitable domain of investigation. As it was with Newton and Darwin, so was it with Savigny.

Sometimes it has caused wonder that a man of such vast intellectual powers should have devoted to law, and Roman law, gifts that might have seemed intended for mankind; for mankind, that is, in some practical and immediate way. The answer, however, is surely not far to seek. Man cannot live by bread alone; and even breadwinners cast their bread upon

the waters that it may return after many days. A lawyer, even a jurist, does not appeal to the popular mind. To be a Napoleon does so appeal. Yet probably Napoleon's greatest work was one that brought Savigny, so far as intellect clashes with intellect, into direct conflict with the victor of Jena. The Code Napoléon was attacked by Savigny with a vigour, a swiftness, and a certitude worthy of the great captain himself. And Savigny's pungent criticism stands to this day. In so far as Napoleon's Code has survived and permeated Europe it has tended to diminish the efficiency of law as a thing that grows with a people's growth and reacts on their efficiency. Napoleon's successful enemy, England, strenuously maintained that identical system of legal development advocated by Savigny, with the result that we are approaching an age when codification slowly becomes possible in the sense anticipated by the jurist of Berlin. This illustration of the relation of a jurist to daily life is not without its value. The jurist is greater than the legislator. His function is so to lay down general laws of juridical development that nations in the course of remedial legislation may have a guide which will show them how to adapt that legislation to the needs of the people; how to evolve it from a living legal system; and how to make it stage by stage an expression of the life of the people, and at the same time a guiding force that will lead not only individual peoples but all nations to adopt ever higher standards of conduct, ever closer and closer approximations to the divine laws of righteousness and equity that stand like Platonic patterns towards which the nations turn their eyes. If this is the function of the jurist, then he stands among the great benefactors of the world, and few will doubt that Savigny, whose soul was a very pattern of clarity and charity, will remain a bright particular star as we move farther away from the great nineteenth century and watch through Time's impartial glass the fixed stars that brood over it and by which we guide our fate. The motto of Savigny's family, *Non Mihi sed Aliis*, had had a real meaning in the lives of his ancestors. In the case of Savigny himself the words reveal his character, his ideals and his daily task. One of the very greatest of the jurists, he saw underlying all law the law of love.

EMPLOYERS, EMPLOYEES, AND ACCIDENTS.[1]

[*Contributed by* Sir John Gray Hill.]

At the last meeting of this Association held at Budapest in 1908, Dr. Baumgarten and Dr. Géza Pap read valuable papers entitled respectively "A Comparative View of the Laws relating to Workmen's Compensation" and "The International Aspect of the Workmen's Insurance." These papers dealt principally with the rights of foreign workmen or their dependents, whether the accident happened at home or abroad, against home employers, or against home insurance funds (where the latter are substituted for employers in regard to liability), and with the desirability of adopting international agreements to provide equal treatment for home and foreign employees alike. No doubt such agreements are desirable, and progress has since been made in this direction; but it is not upon that question that I wish to address you.

I desire to make a few observations upon the divergences existing in the laws of different countries upon the general subject of what is known as Workmen's Compensation; and as those laws cannot be looked upon as having yet assumed their final form, I propose to make a few suggestions upon what appear to me to be imperfections in some of them, and to propose what appear to me some improvements which one nation might borrow from the legislation of another.

As the learned authors of the two papers point out, there is a wide diversity in the different laws in question. It is observable as regards the nature of the special enactments recently passed in the majority of countries making provision for injuries due to accidents happening to employees. It is also observable as regards the laws existing in all countries prior to those enactments.

Before the passing of the recent legislation the law of France and of many continental nations made the employer liable for the negligence of one of his employees which caused injury to another employee, in the same manner as if the latter were a stranger; and did not admit the defences of common employment and assumption of risk by the employee, which were so unfortunately (as I think) admitted by British Courts, and by the Courts of the United States.

[1] Read at a Conference of the International Law Association, Guildhall, London, August 3, 1910.

The special enactments referred to have been adopted by nearly all the chief European countries, and by nearly all the British possessions, but only very partially and to a very limited extent in the United States.

The justification put forward for the new laws is that it is expedient in the public interest to throw the risk of accidents upon the trade in which they occur, and that the employer can recoup himself for the cost incurred by him by raising the price of his productions, and by reducing wages.

How far this reimbursement is possible is an economic question which I am incompetent to determine. But the amount involved must be extremely large. During the year 1908 there was paid in compensation to injured employees and their representatives in the United Kingdom, under the Act of 1906, more than £2,000,000 (Home Office: Workmen's Compensation, Statistics of Compensation, 1909).

The returns are not exhaustive: the pending claims under the Acts of 1897 and 1900, the legal costs of the employers, and the payments made under "contracting out" schemes certified by the Registrar of Friendly Societies under the Act of 1906 are not included. Nor can the cost of the accidents of one year be ascertained without including an estimate for payments to be made in future years arising out of these accidents. Not until the lapse of many years can a fairly average annual cost be arrived at. And it is obvious that to arrive at the real cost of the Act to employers, it is not the amounts paid in compensation by insurance companies with which the employers insure their risk which should be considered, but the premiums paid by the employer for the insurance. The latter must necessarily include not only the compensation paid, but the expense of working the insurance business, the remuneration paid to the officers and agents of the insurance companies for obtaining the contracts of insurance, for inquiring into the claims made, settling or defending them, fees to the medical men and lawyers employed by them, and lastly the profit of the companies, without providing for which they would not grant the policies.

The total cost to British employers in 1908 must therefore have greatly exceeded £2,000,000. The cost to the employers in all countries which have adopted this kind of legislation must then have been enormous.

It may be of interest to mention that in 1902 in Germany, nearly 20,000,000 persons came under the Accident Insurance Laws, and the total cost of working was nearly £7,000,000 (Home Office Report, Workmen's Compensation, vol. iii., Supplementary Appendix).

It is now useless to inquire whether taking the whole matter into consideration, including the effect on employees themselves, the policy of the special enactments is wise. It is so well established and so widely spread that it must be accepted. It must, however, be admitted that whatever good it may effect it is attended by certain evils.

What should be the main objects aimed at by these laws?

The thing most to be desired is the avoidance of accidents. Efforts are made in this direction in nearly all countries by statutory or Government regulations, of a nature altogether apart from the recent laws, which must have met with a great deal of success. But I doubt if the special enactments which I am considering have had any effect of this kind, except so far as they have tended to exclude from employment persons in such a physical condition as to make them specially liable to accident; which is a tendency against the public interest, as it restricts the opportunities of the wage-earning class.

But putting aside the question of prevention, and dealing only with the state of affairs existing after an accident has occurred, the chief object should be where practicable to restore the health and strength of the injured person as rapidly as possible. This end is not furthered in any way whatever by the British Workmen's Compensation Act of 1906, nor by the Acts relating to the same subject in force in any of the British possessions, nor by the various Acts relating to the liability of employers for accidents caused by defects in appliances or negligence of superintendents, existing in certain of the United States of America. Healing depends chiefly, as medical men tell us, upon first treatment, but all these Acts leave the sufferers to their own devices. The injured person very often through ignorance or neglect allows results to flow from the injury which are not the necessary result of it.[1]

None of these Acts entitles the employee to any provision of medical aid. Nor does any of them entitle the employer to interfere. And yet the latter is generally made to pay for the aggravation of the injury attributable to ignorance or neglect; although in theory such result is not due to the accident.

In Germany, on the other hand, medical treatment is provided by the insurance fund, and is in effect compulsory on the sufferer.

The next object should be to provide machinery to ensure the claim being dealt with as rapidly and cheaply as possible. To this end the great point is to obtain an immediate and absolutely impartial medical investigation, the result of which shall be accepted as binding on the parties, at any rate until displaced by evidence to the contrary. If the report made by the impartial investigator be accepted as unquestionable, a vast amount of legal and medical fees would be saved, and great promptitude of decision obtained. In this country the inquiry is postponed until the claim for compensation comes before the Court, when doctors, who too often come to look upon themselves as advocates, are produced as witnesses one against another, and between their conflicting opinions the truth becomes very difficult for the tribunal to ascertain, whilst very great expense is incurred in obtaining the evidence.

[1] A very common case is that of an abrasion of the skin, which for want of attention, even of cleanliness, brings about blood poisoning.

As impartial investigators eminent medical men of the highest standing must be selected, and a sufficient remuneration must be paid, for men of this stamp cannot be obtained at a low rate of pay.

It would be of great advantage to all concerned if it were further provided that the medical men so appointed should continue to treat the sufferers as their patients, so as to be able to assist the recovery of the latter, and to report upon their condition from time to time.

The points in which the Acts of different countries vary from one another include the following:

1. Whether the employer is personally liable to the employee, or only bound to provide or contribute to the cost of an insurance fund out of which payment is to be made.

2. Whether, when the employer is liable, his liability is for accidents however caused, or only for those due to negligence of the superintendent appointed by him or by his authority, or to the defective state of the appliances used in the work.

3. The occupations to which the enactments relate.

4. The maximum amount of annual earnings which exclude an employee from the benefit of the Act.

5. The acts of the employee in relation to the accident which disentitle him to establish his claim.

6. The extent of the claim of the employee or his dependents. In this are included—

   (*a*) In case of temporary disablement the right to medical treatment, nursing, etc., and the duty to submit to the same; the period after the accident at which the first payment having reference to wages becomes due; the proportion which the payment bears to wages; the minimum and maximum limits both as to amount and as to the period for which they are to be continued; and special provisions as to persons under age.

   (*b*) In case of permanent disablement, whether partial or total, the enactments differ as to the like questions, and also as to whether a certain value or scale of compensation should be applied to the loss of a particular part of the body of the employee, such as a leg, an arm, or an eye.

7. In case of death—

   (*a*) The allowance for funeral expenses.

   (*b*) The rights of the dependents—what relations are to be considered as such, and in what order, and whether illegitimate relations are to be included, and to what extent—the mode of arriving at the amount payable, whether by lump sum or by annuity—the period for which the latter is to last, and the minimum and maximum limits as to amount.

8. How the enactment is to be administered, *e.g.*,

(*a*) How far Government or other officials acting independently of the employer and employee are to intervene in the administration.

(*b*) Whether questions as to the interpretation of the enactments and the rights of the parties under them are to be decided by a special tribunal, or by the ordinary Courts of the country concerned.

(*c*) What powers of appeal are to be given.

(*d*) How the expenses involved in the settlement of these questions are to be borne.

9. Whether sickness and disease not arising from accident are to be provided for.

10. The bearing of the enactment upon the limit of liability of shipowners for loss of life or personal injury.

11. Whether the employee should be entitled to enforce a claim against a foreign shipowner residing out of the jurisdiction of the Courts of the country where the employee resides, by arrest of his ship, situate for the time being within the jurisdiction.

12. Whether the employee should be entitled to contract with the employer, under any and what circumstances, not to claim the benefits of the enactment.

The most important in principle of the above differences is that which relates to the question whether the employer should be personally liable to the employee, or only bound to provide or contribute to insurance sufficient to cover the risk. It is true that for some practical purposes this is less material both to employer and employee than would at first sight appear. On the one hand the employer can, and generally does, protect himself by insuring with solvent insurance companies, or by contribution on the mutual system with other employers engaged in the same trade, and thus he is saved from ruinous claims. On the other hand, by these means the employee is made sure of receiving his compensation, even if the special enactment does not, as it generally does, give him a direct right of recourse against the insurers.

The enactments of some countries give the employer the alternative of personal liability or insurance. This, however, from the same point of view is not very material.

But the plan of throwing the whole risk upon insurance, especially if carried out by contributions by all parties interested, and especially also if claims are dealt with, and the law administered by those parties jointly acting through their respective representatives, possesses some great advantages. It removes the sense of injustice to the employer created by making him alone responsible for what he cannot by any care avoid. It diminishes the risk of fraudulent and exaggerated claims, which is so unfortunate an accompaniment of the system of personal liability. It generally enables all questions which may arise to be decided without undue delay or expense.

Furthermore, it affords a convenient opportunity of providing by the same insurance for disablement or death of the employee caused by disease, or other natural decay. If such a system is adopted it would avoid the necessity of inquiring into what constitutes an accident, and whether the accident arises out of the employment, both of which questions are sometimes very difficult to determine. And if, as would be a desirable part of the scheme, the employee contributes to the insurance fund, the result would be to interest him in avoiding risk to his fellows, and in preventing unfounded and exaggerated claims from being preferred by them.

It appears to me that this is a system which is worthy of universal acceptance. But waiting for its adoption may be like waiting for the millennium; so I will turn to points more likely to meet with a favourable reception.

Upon the question whether the liability of the employer should be restricted to accidents due to negligence of his superintendent, and defective state of the appliances, or should extend to accidents, however caused, I need only observe that the former principle was adopted by the British Employers' Liability Act, 1880, and was followed after some years in several of the British possessions, and several of the States of the American Union. But in the British possessions, as well as in continental countries, it is rapidly giving way to the principle of liability for all accidents, and the like development in the United States appears only to be hindered by constitutional difficulties.

Many of the matters of difference in the special enactments of the various countries rest upon solid grounds of reason, based upon the different rate of wages, cost of living, etc.; and as to such matters uniformity cannot be expected, and is not indeed desirable. But there are peculiarities in some of these laws which might be wisely adopted generally.

The special enactments differ as to the occupations to which they apply. The general tendency has been to begin with the more dangerous occupations, and gradually to adopt the less dangerous, until Great Britain, and I believe also Switzerland, have included all ordinary employments. Owing to democratic pressure all other countries will I think eventually follow the example of these.

Employees earning more than a certain fixed amount (which may vary in different countries in accordance with the rate of wages, cost of living, etc.), whether engaged in manual labour or not, should obviously be excluded from the benefit of these enactments, as such persons may be reasonably supposed to be able to look after their own interests, to save money, and to insure their own risk. It is not necessary to extend protection to well-to-do people. It is only required for the poor.

The amount of the annual remuneration which excludes the employee from the benefit of the British Act must exceed £250, unless he is employed in manual labour, in which case he is included, however large his remunera-

tion may be. In Belgium (where the Act is confined to workmen) the amount is £96.

Employees engaged casually, or for less than a certain period, should be excluded. By the British Act employment for a period, however brief, involves liability, and the employer is liable to casual employees if the employment is for the purpose of trade, but not otherwise. Thus if a grocer hire a boy out of the street to carry a parcel of sugar to his customer, he is liable for an accident happening to him, but if he hire the same boy to carry his portmanteau to the railway station (at any rate with a view to a journey unconnected with his trade) he is not liable, a distinction which appears to be unreasonable.

It seems to me that the extent of the liability should in some way be commensurate with the period of the employment, and the rate of wages paid by the employer to the employee. But this principle is not generally recognised.

I turn now to the consideration of what conduct of the employee should be a bar to a claim. It is surely right that serious misconduct of whatever kind causing the accident should have this effect, whatever the result of the accident might be. A man must endure the consequences of his own misconduct. It is unjust to make him liable for the consequences of the misconduct of another.

"And where the offence is let the great axe fall."

Under the British Act, misconduct, even when it is wilful as well as serious, does not exclude a claim if the result is death, or permanent disablement. The most common case of misconduct is drunkenness, and employers have very frequently been compelled to pay for a disaster brought about entirely by this cause.

In New Zealand no compensation is due in respect of any accident which is attributable to the serious and wilful misconduct of the worker injured or killed. In some countries serious neglect, in others gross misconduct, in others inexcusable fault, deprive the worker of his claim. In the Province of Quebec the Court may reduce the compensation if the accident was due to the inexcusable fault of the employee. There is room amongst those different provisions for a middle course, which I suggest should be fixed as above, viz. that serious misconduct should bar the claim.

As to the extent of the claim of the employee or his dependents I have several suggestions to make.

In case of disablement, if the payment of compensation begins too soon, there is a tendency to claim for an injury so trifling that it should be disregarded. I think fourteen days, the date which was fixed by the British Act of 1897, is the right period. The diminution from fourteen to seven days made by the Act of 1906 has led to a great increase in the

number of claims, and to a great exaggeration of injuries suffered. In some countries the compensation begins at once; in some it is delayed for as long as thirteen weeks; in others for lesser periods of differing extent.

The amount of the allowance should be half the wages, with a maximum limit varying according to the rate of wages prevailing in each country. In the United Kingdom the maximum is £1, in some continental countries it is a good deal less, and in New Zealand and under the Australian Seamen's Compensation Act, 1909, it is as high as £1 10*s*.

The liability to continue weekly payments should only last for a certain number of years, and there should be a limit to the total amount. Under the British Act it ends only with the life of the employee, subject to a right to redeem the liability by payment of a capital sum sufficient to purchase an annuity for the latter equal to 75 per cent of the annual value of the weekly payment, and there is no limit to the total amount of the liability of the employer. This is very unreasonable. It is quite possible under this Act that an employer who has only employed a man for five minutes may have to support him for sixty or seventy years, or pay a very large sum for redemption. In Spain the obligation is limited to two years' wages. In New Zealand the term for which the payments are required is six years, and the maximum amount is £500. In the Province of Quebec the maximum is $2,000.

There should be a scale of payment in fixed lump sums, or fixed weekly payments, bearing a relation to the rate of wages for permanent injuries consisting of the total loss of certain members of the body, such as a leg, an arm, or an eye. This would so greatly simplify the prompt settlement of claims, and be such an important inducement to injured workmen to return to work as soon as they are able to perform it, as to justify a rough and ready mode of fixing the compensation. In New Zealand the Act of 1908 provides in a special schedule for assessing compensation for injuries that are necessarily permanent, *e.g.* the ratio of compensation for the loss of one eye is 30 per cent of the full compensation, and if the other eye is also seriously affected it is 75 per cent of the same.

In case of death the amounts payable to dependents vary greatly in different countries; and there is also a difference in the mode of payment. In some countries, including Great Britain, a lump sum is paid. In some other countries an annuity is substituted.

In regard to the dependents, illegitimate relations in certain degrees are generally entitled to claim jointly with the legitimate. French law takes the precaution of only including such children as are "réconnus avant l'accident"; and it only includes children whether legitimate or not under sixteen years.

It seems to me that illegitimate dependents should be excluded altogether. Irrespective of moral considerations, it is obvious that the difficulty of proof of paternity is often very great (children are, of course, the most

important of the illegitimate dependents), and that the attempt to prove it often leads to much false allegation. At any rate illegitimate dependents, children or others, should not be allowed to compete with those who are legitimate in the distribution of the fund provided for compensation, which they are entitled to do under the British Act.

If by the negligence of any one another who is not in his employ is killed, the British law does not give any remedy to the illegitimate relatives who are dependents of the deceased; and I suppose that the law must be to the same effect in this respect in many other countries. Why should such dependents of an employee have greater rights than the dependents of a stranger?

With regard, however, to the receipt by injured persons or the dependents of those killed of payments of lump sums in satisfaction of their claims, there are very serious objections. Some machinery ought to exist for spreading the payment when advisable over a long period. With regard to dependents there is some protection under the British Act, but with regard to injured persons none.

It is of common knowledge that, when those who are unaccustomed to have large sums in their control become possessed of them, they are apt to spend them recklessly. And it very frequently happens that amounts paid in redemption of liability are thus wasted. Sometimes such payments do harm rather than good, the recipients indulging in drink and dissipation to such an extent as to bring about illness or death. This is especially the case in regard to unskilled labour. If the British Government would inquire into the mode in which those payments are spent (which could be done through the Poor Law Guardians, the Charity Organisation Societies, and the police), they would find how great this evil is. It could be best remedied under a system of insurance, where machinery would exist for arranging the payments according to the individual requirements of each case. In default of this the Court, or a public official, should receive the sum in question, and pay it over to the person entitled in such portion and at such times as would be most for his benefit.

The mode generally in which the enactment should be administered and the expense dealt with depends upon whether personal liability or insurance is the basis for providing compensation.

In addition to what I have already urged in favour of prompt and independent investigation and medical direction, I may say that I am in favour of a reference of disputes to the ordinary local Courts of Justice; such as in England the County Courts. A judge with no general experience in the administration of justice would be very unsatisfactory. In the British Workmen's Compensation Act, the judge is for some mysterious reason called an arbitrator; but for practical purposes he remains a judge notwithstanding his statutory appellation. The Court must be local in order to avoid expense. The great points are promptitude of decision and

cheapness. Juries should be excluded as too uncertain and varying in their verdicts. But the Court should not be hampered, as the English County Courts are, with an enormous mass of rules and forms, to determine the meaning of which often causes litigation, which has little or nothing to do with the merits of the case.

I recommend that only one appeal should be allowed. The delay in the United Kingdom in obtaining the decision of two Courts of Appeal is very considerable, and in other countries it is very much greater. In the United States this and legal delays generally are so great as to amount to a public calamity. There is also the question of expense to be considered.

For reasons already given, I am strongly in favour of providing for sickness and disease as well as accident, and that this should be accomplished by a system of insurance to which both employers and employees should contribute.

In this country we have workmen's compensation falling wholly on the employers, and old-age pensions falling wholly on the State, but no provision for sickness.

In Germany, as I understand the matter, sickness and accidents are provided for during the first thirteen weeks by a fund to which the workmen contribute two-thirds and the employers one-third; and old age and invalidity are provided for by a fund to which the employer, the workmen, and the State all contribute.

So far as regards accidents alone, I think that upon the basis of the German statistics the cost of an annual contribution by the workmen would work out at only a trifling sum per head. The inclusion of sickness, invalidity, and old age would naturally be more serious in this respect.

With regard to legal expenses, where there is a dispute in which the claimant succeeds, those incurred on both sides naturally and justly fall on the employer. But if the claimant fails, the employer can never recover his costs, for the simple reason that his adversary is unable to pay them. I do not know where to find a remedy for this misfortune in all cases; but where it happens (as it often does) that the claimant is a member of a Labour Union who are bound by agreement with him to take up his case, I think that the judge should have a discretion to require security for costs to be given at the beginning of the proceedings.

With regard to the bearing of the enactment upon the limit of shipowner's liability, it is to be observed that the British and the New Zealand Workmen's Compensation Acts, and the Australian Seamen's Compensation Act, provide that payments are to be made in full, notwithstanding this limit.

I am not aware of any similar provision in the laws of other countries, or of other parts of the British Empire. And yet it should not be forgotten that while under the law prevailing in the latter the liability of the shipowner

for loss of life or personal injury of all kinds extends to £15 per ton, with the addition, in the case of steamships, of engine-room space, his liability is by the law of all other countries limited to the value of the ship and freight, and is extinguished by the total loss of both.

The result is that the British shipowner is, by the special provisions of the Workmen's Compensation Acts referred to, as well as under the British Merchant Shipping Act (except in the case of ships of very high value), placed at a disadvantage as compared with foreign shipowners.

There remains a question which has, I think, excited some feeling of annoyance amongst our continental friends. I mean the right given by the British Workmen's Compensation Act to enforce a claim *in rem* against a foreign ship by arresting the vessel when in the jurisdiction of the British Courts, and proceeding against the party giving security as if he were the party liable. For practical purposes this right only extends to dock labourers and lightermen engaged in loading or discharging the vessel, so that the matter is not of much importance.

The liability *in rem* of foreign ships in claims for personal injury or death, whether of workmen or strangers, exists not only in the United Kingdom, but also in the United States. I understand, however, that it does not exist in some continental countries. The simplest way of removing the grievance would be for those countries to adopt a similar law for the benefit of their workmen.

With regard to the prohibition of contracts excluding the benefits of the special enactments, it appears to me that where the system of personal liability of the employer is in force, it is very important that exceptions to the law which prohibits contracting-out should be allowed in special cases. This is even more important in the interests of the employees, and of the community generally, than in that of the employer. The elderly, diseased, and weak, being more liable to accident than the young, healthy, and strong, the employer will not employ the former if held liable to compensate them for accidents really due not to the work, but to their physical condition. Workmen are frequently discharged for this cause, and it is a great hardship upon them that this should be so.

The reason why the employer adopts this course is well illustrated by a recent decision of the highest Court of Appeal in this country.[1] A workman suffering from an aneurism in so advanced a state that it might have burst at any time, even in his sleep, was tightening a nut with a spanner without using any unusual force, when this exertion ruptured the aneurism, and he died. The majority of the judges decided that the employer was liable to the dependents of the deceased. And yet it cannot be disputed that the death was really due to the disease rather than to the work.

Unless then contracting out is allowed, it is natural and not unreasonable

[1] *Hughes* v. *Clover Clayton & Co.*, 26 Times Law Reports, p. 359.

for the employer to refuse to employ a diseased man, or a man who from any other cause is specially liable to accident.

In most cases a superficial inspection is sufficient to enable an employer to reject old, weak and diseased persons; but in order to make sure the employer is now in many cases adopting a system of medical inspection before the contract of service is entered into. This is already very common in the mercantile marine. Thus many persons still capable of doing useful work are cast aside, the work which they could do is lost to them and to the community, and their maintenance is thrown upon the latter.

Why should not such persons be allowed to contract themselves out of the Act? The man referred to in the above case might well have felt (knowing that from the state of his heart he was liable to sudden death at any time) that he was ready to run the risk of dying at his work instead of in his bed.

The Trade Unions have protested against the action of employers in refusing to employ men who are elderly, or have some physical defect. But this is the inevitable result of the Act, and the interpretation put upon it by the Courts. The effect is likely to be especially grievous in the case of old domestic servants, a class which should as far as possible be cared for as part of the family. How cruel it would be if owing to the liability placed on employers by the Act such worthy old inmates of the household should be cast adrift, because the diseased state of their hearts or lungs makes them liable to death while engaged in any act of service, however slight!

The Trade Unions could very easily get this amendment passed by the British Parliament, as no one else would oppose the proposal, but if they insist on retaining both the universal liability of the employer and the universal prohibition of contracting out, they must fail, as all fail who seek both to have their cake and to eat it.

It is interesting to see that New Zealand has made a movement in favour of contracting out, although it does not touch the case of age. The Act of 1908 provides that a worker may agree with his employer that no compensation be payable on account of disease or injury from which he has suffered prior to the employment, if the agreement be first approved by a magistrate.

The legislature of Queensland has gone still further in this direction. For in addition to a somewhat similar provision as to workmen suffering from disease or injury, the Queensland Act of 1905 allows workmen over sixty years of age to agree in writing with their employers to fix a maximum rate of weekly payment of not less than 5*s*. with a minimum total liability, whether in case of injury or death, of £50.

In my view a permission to contract out in all cases of physical debility, or of persons who have reached a certain age, say fifty, would be one of the most valuable reforms in the interest of all concerned—the employer, the

employee, and the community—which could be made in the legislation relating to the subject of Workmen's Compensation.

I have spoken chiefly from my experience of the working of the British Act. It will be interesting to learn the experience of other members of our Association with reference to the working of similar laws in other countries. As to the latter enactments I may perhaps have fallen into some errors. If so I shall be glad to be corrected.

THE DECLARATION OF LONDON.[1]

[*Contributed by* Sir John Macdonell, C.B., LL.D.]

I.—INTRODUCTORY.

I propose to examine some of the chief effects of the Declaration of London, one of the most important instruments in the history of International Law. It is not yet ratified by this country. But, whatever may become of it, the Declaration is a unique expression of opinion by some of the chief States of the world as to International Law and usages. It marks their approximation to an agreement respecting matters as to which they have hitherto been divided. It is just to claim that "the Declaration puts uniformity and certainty in the place of the diversity and obscurity from which international relations have too long suffered" (General Report of Drafting Committee, p. 34). It is just to add that the Conference from which the Declaration issued "tried to reconcile in an equitable manner and practicable way the rights of belligerents with those of neutral commerce." It is eminently a work of compromise and mutual concession; and to this may be traced some of the defects which I venture to point out. I should be misunderstood if I did not preface my remarks with recognition of the good work done by the Conference. Points over which nations have quarrelled, which have brought about bloodshed, and which jurists have long discussed without coming to an agreement, have been, it is to be hoped, finally settled. Differences retained for no sufficient reasons between the practices of this country and foreign countries have been obliterated. I am not stating too much in saying that more has been done by this Declaration and the Conventions entered into at The Hague in 1899 and 1907 than had been accomplished in a century previous. There has been a spirit of give and take, an obvious desire to understand the aims of each country, and not to look solely at national interests, or to persist in standing by traditions; all which has been fruitful, and promises well for the future.

Let me add this further prefatory remark: there was no likelihood of establishing an International Prize Court without first framing an Inter-

[1] Read August 2, 1910, at the Guildhall before the Congress of the International Law Association.

national Prize Law. It was worth paying a high price to obtain the former, even if it be only one of appeal.

I would make one other general observation. I have heard it said with reference to this Declaration: "The day of the international jurist is over; the work of developing International Law passes from his hands to those of statesmen and diplomatists meeting in conference, discussing points of difference, and agreeing to some compromise." And assuredly when I look to the varied and important contents of the Conventions agreed to at The Hague in 1899 and 1907, and of the Declaration of London—matters which had been debated by jurists with little effect for centuries, disposed of swiftly—I am inclined to think that, if the day of the jurist is not over, his part has changed, or is changing; his future work will differ materially from his past. He will prepare the way for the wise exercise of the treaty-making powers of States; he will note and point out difficulties; he will formulate the true problems, and often suggest the best solutions; he will elucidate principles when once they are laid down. But, judging from the comparative facility with which Conventions regulating large regions of law have been adopted, the treaty rather than jurisprudence will be the chief instrument of development of International Law. Nations will meet through their representatives and go, so to speak, into committee, and the outcome of their deliberations, a treaty or treaties, will be for International Law what the statute is more and more for the expansion of national and municipal law.

II.—THE PARTIES TO THE DECLARATION.

By a circular letter of February 27, 1908, from the British Foreign Office, invitations were sent to nine Powers to attend a Conference in London. Subsequently Holland also was invited. The representatives of ten States, the chief military and naval Powers of the world (France, Germany, Great Britain, Italy, Russia, Spain, Austro-Hungary, Japan, Netherlands, and the United States) attended. There was no representative of any South American State. Nor was there any representative of Norway or Sweden, though the interest of the former in questions of neutrality, as a State with a large mercantile marine, is considerable. The Declaration contains the law which the International Prize Court will administer. Judges and deputy judges will in pursuance of Art. 15 of the Convention establishing a Prize Court sit in that Court, according to a prescribed rota; and on that rota are judges appointed by such States as Brazil and the Argentine. The question suggests itself: Will the representative of the States which are not parties to the Declaration be bound by its terms? Technically, I presume not; they have agreed only to the Prize Court Convention, assuming they have ratified it. But of course the consensus of ten Powers of the first order of importance as to the chief problems of

Prize Law cannot but have great weight; in most cases it will, I presume, be conclusive.

Another group of States has to be considered. Art. 7 of the Convention for the establishment of an International Prize Court says that "if the question of law to be decided is covered by a treaty in force between the belligerent captor and a Power which is itself, or whose national is, party to the proceedings, the Court is governed by the provisions of the said treaty." Now some States have special treaty provisions as to matters included in or relating to the Declaration. Thus Germany (Prussia) and the United States are parties to treaties (July 11, 1799, and May 1, 1828) by which contraband is not confiscated, but only expropriated; Italy and the United States to a treaty by which immunity of private property at sea is recognised (February 26, 1871). It will be the duty of the Prize Court to apply such special provisions even if they conflict with the Declaration.

III.—FORM AND POLICY OF THE DECLARATION.

Of most of the articles in the Declaration one may say that they embody, as M. Renault observed, a *media sententia*. Some of the articles are drawn, no doubt, to secure general assent, in a vague manner—to quote an historic phrase, in "less accurate language"—which will leave the decision of questions certain to arrise in warfare to the discretion of belligerents, or of the Court if they come before it. Some of the ambiguities are removed, wholly or partly, by the accompanying General Report. Some still remain; and in dealing with contraband I shall mention a few of them.

Unfortunately, the exact degree of authority of the report is not clear. It is stated in the despatch of March 1, 1909, that "in accordance with the principles and practice of continental jurisprudence, such a report is considered an authoritative statement of the meaning and intention of the instrument which it explains, and that consequently foreign Governments and Courts, and no doubt also the International Prize Courts, will construe and interpret the provisions of the Declaration by the light of the commentary given in the report."[1]

Nothing to this effect appears in the Declaration. The commentary seems occasionally to extend or qualify, if not conflict with, the text. The tribunal which construes the latter may have a fresh difficulty if any of the Powers append to their ratification a statement of their understanding of any particular article.[2] In extenuation of the occasional loose phraseology it may be urged that this is a usual fault in the early stages of codification. Unfortunately, compromises entered into in order to obtain unanimity are apt to be forms of words which conceal rather than remove differences of opinion; the temporary interment of troublesome questions.

[1] Miscellaneous No. 4 (1909), p. 94.

[2] See answer of the Secretary of State for Foreign Affairs, April 5, 1909.

Though the Conference of London accomplished much, it did not produce a complete Code of Prize Law. The rules agreed to are said to "correspond in substance with the generally accepted principles of International Law"; but they are not exclusive and complete. At the second Hague Conference a convention defining the Rights and Duties of Neutral Powers in Maritime War (No. XIII.) was agreed to. There was also another convention (No. XI.) relative to certain restrictions on the exercise of the right of capture in maritime warfare, and dealing, among other matters, with the important subject of postal correspondence. As to more than one passage we must read the Conventions of The Hague before we can fully comprehend the Declaration. Even read in connection with them the Declaration is incomplete. Matters of importance to neutrals and belligerents are left untouched by the seventy-one articles. Nothing is decided as to the transformation of merchant vessels into ships of war; and while that is unsettled the facilities for reviving the substance of privateering remain. Nothing, too, is decided as to the enemy or neutral character of the owner of the goods. There are also other omissions to which I shall advert.

As to the scheme of the Declaration, it consists of seventy-one articles and nine chapters. The first part deals with blockade; the second with contraband; the third with unneutral service; the fourth with destruction of neutral prizes; the fifth with transfer of a neutral flag; the sixth, enemy character; the seventh, convoy; the eighth, resistance to search; the ninth, compensation.

Before discussing individual articles of the Declaration, a word as to the policy underlying it. Dealing as it does with the conflicting claims and interests of belligerents and neutrals, it may be looked at from the point of view of either. In other times than the present, the interests of the former dominated, and with some show of reason. They were contending, it might be urged, for existence; their demands ought to be supreme. There was force in the sharp opposition drawn by Albericus Gentilis, in a well-known passage,[1] between the subsidiary interests of commerce and the vital interests of the State as a belligerent. That contrast is not so great as it was. In the world of to-day, some communities are dependent on foreign supplies of food for their very existence and for raw materials essential to their chief industries. We live by oversea trade. To us and some other nations unimpeded commerce may be a question of supreme importance.

Further, peace is to-day what it once was not; it is now the normal condition of the world; and *prima facie*, subject to well-established usages, neutrals are entitled to pursue their trade irrespective of quarrels to which they are no parties. I cannot say that the Declaration contains a com-

[1] "Jus commerciorum æquum est: at hoc æquius tuendæ salutis. Est illud gentium jus: hoc Naturæ est. Est illud privatorum: est hoc regnorum. Cedat igitur regno mercatura, homo naturæ, pecunia vitæ. Istæ sunt rationes solvendi legum pugnas: ut digniori, utiliori, æquiori cedatur legi" (*De Jure Belli*, lib. i. c. 21).

pletely equitable recognition of the rights and interests of neutrals. It is, with all its many merits, in the main a series of compromises between States reluctant to give up anything which might be of use in war.

IV.—BLOCKADE.

Several of the articles relating to blockade repeat generally accepted rules. Thus Art. 1 states the present recognised rule as to blockade. Art. 2 states the rule formulated in the Declaration of Paris of 1856, that a blockade to be effective must be maintained by a force sufficient really to prevent access to the enemy coast-line. The wording of this seems inconsistent with the notion that a blockade can be maintained only by stationary vessels; a rule which some of the advocates of the Armed Neutrality of 1780 and 1800 attempted to set up, and the observance of which is incompatible with the conditions of modern maritime warfare and with the weapons now in use.

No express mention is made of blockading by means of mines, floating or moored, laid off the coast or port blockaded; a measure which it is possible will in some circumstances be resorted to. The wording of certain articles (*e.g.* 2 and 6) seems opposed to such methods of barring entrance or egress. Such a phrase as "sufficient force" or "blockading force" is, to say the least, an inapt description of apparatus operating automatically. The rules on the subject contemplate the admission of neutral vessels of war in certain circumstances or neutral vessels in distress, which might be incompatible with the existence of a girdle or line of mines. But it must be remembered that the tribunal will have to take note of other Declarations than that of London. By Convention VIII., Arts. 1 and 2 of The Hague, which is binding on the signatories, it is forbidden to lay unanchored automatic contact mines, unless they be so constructed as to become harmless one hour at most after those who laid them have lost control of them, or to lay anchored automobile contact mines which do not become harmless as soon as they have broken loose from their moorings. It is also forbidden to lay automatic contact mines off the coast and ports of the enemy *with the sole object of intercepting commercial navigation.* This last prohibition may be said to stamp as illegitimate the blockading by such means of a purely commercial port. It does not prevent the use of such means in the case of a port where lie belligerent ships of war or a port into which such vessels seek to enter. In fact, this point was discussed at The Hague in 1907. The British representative proposed to prohibit the use of mines for commercial blockades and elsewhere than before naval ports. Another proposal was that they should be employed only for coast defence, and only within the maximum distance of cannon range. Both proposals were rejected.[1]

[1] Miscellaneous, No. 4 (1908), pp. 229, 230. See Professor Westlake's comments on this article, *International Law*, part ii. p. 326.

The conditions of naval warfare have so changed, and are so changing, that there may be a strong temptation to employ mines, if not exclusively, as a supplementary or auxiliary method of blockade. It seems clear that blockading in the future will have little resemblance to the operations of Collingwood off Cadiz, Brest, and Toulon.[1] The 21-inch torpedo with a range of over 7,000 yards, a speed of 40 knots, and "astonishing" accuracy;[2] the submarine with a speed when submerged of 10 knots, and a range of 2,500 miles; the aviator capable of moving by day or night, and dropping explosives over battleships in the vicinity of blockaded ports: these facts may have—in the opinion of some authorities they actually have—changed the situation. It is true that in 1899 and 1907 there was adopted a Declaration, the parties to which agreed to prohibit "the discharge of projectiles and explosives from balloons or by other new methods of a similar nature." But neither Germany nor France, nor any of the other great military Powers except Austro-Hungary, has agreed to this prohibition. The probable effects of these changes upon blockades are thus described by writers of authority:

> We have a sort of half-digested idea that because we "blockaded" the enemy's ports in old days we ought to do so again. Some impulsive people get purple in the face when they hear of any strategy but that of Duncan at Camperdown. They only ask to lie alongside the enemy, and will let strategy go hang. But, after all, it is not possible by naval action to extract a hostile fleet from its harbour, like an oyster from its shell, if it does not propose to come out; while as for blockading, in its popular interpretation, Nelson's principle was absolutely the reverse, as he has left on record in the plainest terms. Not even the watches off Brest, Toulon, and Cadiz are now simple operations. The mine, the improved torpedo, the submarine, the destroyer, the airship, wireless telegraphy, and long-ranging coastal ordnance have revolutionised the conditions of operations off an enemy's coast, and whether it likes it or not, has to take account of the situation. I think that our battle fleets will have to keep out of harm's way, and leave the flotilla to carry on the war.[3]
>
> It is likely that long before the ships which are now being built shall have become obsolete, seas like the Baltic, the North Sea, the Mediterranean, the Yellow Sea, the Sea of Japan, and many other seas of a similar nature will become entirely unsafe as operating grounds for battleships in cases where an enemy possesses coasts bordering on such seas.[4]

Instead of the patrol of a number of ships, described by Collingwood in his letters, one vessel in communication by wireless telegraphy with others lying far distant, but capable of steaming 18 to 24 knots an hour,

[1] Russell's *Life of Collingwood*, p. 86.

[2] "The Submarine Menace," by Colonel A'Court Repington, *Blackwood's*, June 1910, p. 894.

[3] *Ibid.*, p. 897.

[4] Professor Hovgaard, Jane's *Fighting Ships*, 1910, p. 502. For another view see chapter on "Blockades under Existing Circumstances," by Admiral Colomb, *Essays on Naval Defence*, published in 1893, and written in 1887.

might suffice; and it may be that, owing to the constant danger from torpedoes and submarines, there will be a temptation to employ mines as a supplementary or auxiliary method of blockade. Another result may be, Art. 17 notwithstanding, to greatly widen the operations of blockading squadrons, to the detriment of neutrals. As to this I quote the words of Mr. Julian Corbett:

> Under modern conditions of naval warfare it was almost impossible to draw the line between blockade and pelagic capture. The reason for that was the introduction of the torpedo. *Blockade close to the enemy's port was now impossible.* Warships must go so far out at sea that their operations could not be seen from the shore. Assuming—what was very likely with so friendly a Power—they were at war with France, and they wished to blockade the Atlantic ports, probably the only way would be to extend a line of cruisers from the Scilly Isles to Finisterre. They could, therefore, always justify a capture on the high seas on the ground that they were occupying the only possible situation for blockading a port.[1]

As to the other articles relating to blockade, I have little to say. Art. 2 is so worded as to make it doubtful whether a blockade of ingress only is intended. I conceive, however, that the words, though not felicitous, are designed to apply to both ingress and egress. Arts. 3 and 4 also confirm general usage.

Art. 6 permits the entrance of neutral vessels of war. This has sometimes been put forward, erroneously it seems to me, as a matter of right (Bluntschli, Art. 828). The article, as I understand it, is intended to permit entrance of ships of war of neutral States at the discretion of the belligerent, without rendering the blockade ineffective or partial.

The first notable changes are made by Arts. 8 and 9. The former states: "A blockade, in order to be binding, must be declared in accordance with Art. 9 and notified in accordance with Arts. 11 and 16." In other words, no declaration and no notification, no blockade.

First as to the declaration. "A declaration is made either by the blockading Power or by the naval authorities acting in it." The present rule, according to the English authorities, is that "a blockade may exist without a public declaration; although a declaration unsupported by fact will not be sufficient to establish it" (Lord Stowell, *The Mercurius*, 1 C. Rob. 1798, p. 82). "If the individual is personally informed, that purpose is still better obtained than by a public declaration" (p. 83).

Next, as to notification. The declaration must be notified to neutral Powers by communications addressed to the Government direct or to their accredited representative to the local authorities. There is no obligation to give notice to the ship which has actual or presumptive knowledge. In other words, the rule of French jurisprudence, which requires special notification to the ship, is not followed. Art. 12 states that "the rules as

[1] Speech at National Liberal Club, November 9, 1909. Some of the representatives proposed a limit of 800 to 1,000 sea miles. Miscellaneous No. 5 (1909), p. 162.

to declaration and notification of blockade apply to cases where the limits of a blockade are extended"—which is the present rule.

Art. 13 ("The voluntary raising of a blockade, as also any restrictions in the limit of the blockade, must be notified in the manner prescribed by Art. 11") may be useful to neutrals. The report states: "This non-fulfilment will have more or less serious consequences according to circumstances." Whether under any and what circumstances the belligerent who failed to give notice of raising or restricting of blockade is liable in damages is not stated.

In *The Neptunus* (2 C. Rob. 111) Lord Stowell said: "The effect of a notification to any foreign Government would clearly be to include all the individuals of that nation; it would be the most nugatory if individuals were allowed to plead their ignorance of it; it is the duty of foreign Governments to communicate the information to their subjects, whose interests they are bound to protect. I shall hold, therefore, that a neutral master can never be heard to aver against a notification of a blockade that he is ignorant of it." But Art. 15 apparently contemplates the possibility of such an averment being made and believed; "*failing proof to the contrary*, knowledge is presumed," etc.

When special notice to a vessel is required is stated by Art. 16: "If a vessel approaching a blockaded port has no knowledge, actual or presumptive, of the blockade, the notification must be made to the vessel itself by an officer of one of the ships of the blockading force." The explanation in the report (p. 41) may be quoted: "It cannot be admitted that a merchant vessel should claim to disregard a real blockade, and to break it for the sole reason that she was not personally aware of it. But though she may be prevented from passing, she may only be captured when she tries to break the blockade after receiving the notification. The special notification is seen to play a very small part, and must not be confused with the special notification absolutely insisted on by the practice of certain navies" (p. 41). This appears to be the English rule, which is less favourable to neutrals than the French rule, but which does not seem unfair. It substantially comes to this: a vessel must be somehow made aware of a blockade, otherwise no capture. If she sails without actual knowledge she must get it from the blockading squadron.

Art. 17 contains a very important concession to neutrals. According to certain decisions of the United States Courts a vessel may be captured if she has set out for the purpose of breaking a blockade, even if she intended to touch at an intermediate neutral port.

According to certain English decisions a vessel which sails to a blockaded port after notification and with knowledge may be captured at any time, however distant she may be from her destination.

This is clearly altered by Arts. 17, 19, and 20. Art. 17 declares that neutral vessels may not be captured for the breach of blockade, except

within the area of operations of the warships detailed to render the blockade effective, as to which it is said "all the zones watched together, and so organised as to make the blockade effective, form the area of operations of the blockading naval force. . . . It is clear that a blockade will not be established in the same way on a defenceless coast as on one possessing all modern means of defence. In the latter case there could be no question of enforcing a rule such as that which formerly required that ships should be stationary and sufficiently close to the blockaded places; the position would be too dangerous for the ships of the blockading force which, besides, now possess more powerful means of watching effectively a much wilder zone than formerly" (Report, pp. 41, 42). It is not enough that the vessel is on her way to a blockaded port; there must be a real attempt to pass the forbidden line or zone. This is made clearer by Art. 19: "Whatever may be the ulterior destination of a vessel or of her cargo, she cannot be captured if, at the moment, she is on her way to a non-blockaded port"; which puts an end to the doctrine laid down in *The Columbia* (1 C. Rob. 134), which bars the application of the doctrine of continuous voyages to blockades, and is at variance with the doctrine laid down by the Supreme Court of the United States.

Art. 21 states that the owner of cargo is to be condemned "unless at the time of the shipment he neither knew nor knows of the intent to break the blockade." Having regard to the English authorities (*e.g. The Adonis*, 5 C. Rob. 256; *Baltazzi* v. *Ryder*, 12 Moore P.C. 168), I do not think that this imposes a new burden upon neutrals. It is true that the rule on the subject, as laid down in the *Mercurius*, was "to maintain that the conduct of the ship will affect the cargo it will be necessary either to prove that the owners were, or might have been, cognisant of the blockade before they sent their cargo; or to show that the act of the master of the ship personally binds them"; and Lord Stowell proceeded to point out that "the master is not the agent of the owners of the cargo, unless expressly so constituted by them" (p. 84). But the Judicial Committee went further, and laid it down "that when the blockade was known, or might have been known, to the owners of the cargo at the time when the shipment was made, and they might therefore by *possibility* be privy to an intention of violating the blockade, such privity shall be assumed as an irresistible inference of law, and it shall not be competent to them to rebut it by evidence; that in cases of blockade, for the purpose of affecting the cargo with the rights of the belligerent, the master shall be treated as the agent for the cargo as well as for the ship" (p. 186). I should gladly have seen a milder rule introduced. It is difficult to see how in some cases a shipper really innocent can prove that he "*could not* have known of the intention to break the blockade."

To sum up the effect of the rules as to blockades: they are, on the whole, a fair compromise. They give certain advantages to neutrals. On

the other hand, they do not make blockade very difficult, if not almost impracticable, as the French rules in effect do. But as to some of the rules one cannot help thinking that they are founded on past experience and may be inapplicable to future maritime warfare. So often International Law comes too late: its rules are painfully and slowly elaborated; when the final formula is found the old conditions have vanished or have varied.

V.—CONTRABAND.

Chap. ii. is concerned with contraband, a subject as to which there have been great differences in opinion and practice since the sixteenth century with little tendency to approximation. Two distinct doctrines have been taught; one, sometimes called the Continental doctrine, recognising only absolute contraband, *i.e.* articles exclusively used in war. The other recognises not only absolute contraband, but also relative, conditional, or accidental contraband, *i.e.* articles which, though not exclusively used for purposes of war, may be so used. This is sometimes called the Anglo-American doctrine.[1]

The Declaration takes a *via media*. It retains the distinction between absolute and relative contraband. It enumerates a large number of articles which are absolute contraband without notice. Though long, the list is not necessarily complete. It is stated (Art. 23) that goods, etc., "exclusively used for war" may be added to the list of absolute contraband by a declaration to be notified. The only restriction is that the addition to the list does not bind other Powers; that the new article must be "exclusively used for war"; and that there may be an appeal to the International Prize Court if any wholly unjustifiable additions are made. I am not satisfied that these qualifications afford much protection against abuses. In the heat of war and with the natural oblivion of all but immediate gains, there will be a strong temptation to snatch a passing advantage by declaring absolute contraband any commodity which happens to be very useful to an adversary. It would have been more satisfactory if the list were not susceptible of addition except by agreement of the parties to the Declaration.

Next as to conditional or relative contraband. Art. 24 enumerates articles which are "susceptible of use in war" as well as adapted for purposes of peace, and which may without notice be treated as conditional contraband. It includes food-stuffs, forage and grain suitable for feeding animals, railway material, etc.

One clear gain is conferred npon neutrals by Arts. 28 and 29, which establish a tolerably long and carefully selected list of free goods. This

[1] At The Hague Conference the British Government proposed the abolition of contraband; and several States (including Portugal, Switzerland, Belgium, Austria-Hungary, Sweden, and Brazil) were favourable to this bold proposal. Twenty-six representatives voted for abolition; five voted against it; and four abstained.

would be more valuable if there was provision for periodical extensions or revisions at very short intervals of the free list. In view of the constant and rapid changes in the methods and appliances of warfare, this seems desirable. It is to be regretted that, while provision is made for additions to the list of absolute contraband, there is no provision for an expansion of the free list at short intervals.

So much as to the *nature* of contraband goods; next, as to the other element, their "*destination*," an ambiguous expression, which may mean the destination of the ship carrying them, or the ultimate destination of the goods themselves. The latter sense is by no means clear. Goods suitable for different purposes and markets may be shipped with no certainty as to the place of destination; the master receiving instructions by telegraph where to go according to the state of prices. The cargo may change hands during the voyage, with the result of a change in the destination of the goods. The goods may go to a neutral port, only to be conveyed thence overland to the belligerents. They may be on their way to an army or a fleet or to the civil population just as demand and prices may determine.

Under what circumstances may such goods be captured? The answer (so far as given) to this question is exceedingly complex. Absolute and conditional contraband are dealt with differently. The former is liable to capture (Art. 30) "if it is shown to be destined to territory belonging to or occupied by the enemy, or to the armed forces of the enemy. *It is immaterial whether the carriage of the goods is direct or entails transhipment or a subsequent transport by land.*"

This affirms the doctrine of continuous voyage probably in terms more extensive than the English authorities have used. It goes, I think, beyond what Lord Stowell meant by destination. He did not always state the rule in exactly similar terms; but, speaking generally, destination for him meant destination of ship, which must be to an enemy port or territory. In the *Imina* (3 C. Rob. 167) he remarked:

> This is a claim for a ship taken at the time of sailing for Emden, a neutral port; a destination on which, if it is regarded as the real destination, no question of contraband could arise, inasmuch as goods *going to a neutral port cannot come under the description of contraband*, all goods going there being equally lawful. The rule respecting contraband being, as I have always understood it, that the articles *must be taken* in delicto, *in the actual prosecution of a voyage to the enemy's port.*[1]

Art. 30, as worded, might seem to throw the onus of proof on the

[1] Of course, the intervention of a neutral port will make no difference if the goods are enemy's property, or if the home merchant is really trading with the enemy (*The Jonge Pieter*, 4 C. Rob. 79). Nor will mere transhipment at a neutral port without actual importation break the continuity of the voyage.

See the decisions, somewhat difficult to reconcile, in *Zelden Rust* (6 C. Rob. 93) and *Frau Margaretha* (6 C. Rob. 92). Stress was laid on the fact that in the latter there was land carriage.

captor. This, however, is altered by Art. 31, which, dealing with absolute contraband, states that proof of destination, *i.e.* "hostile destination," is complete:

(*a*) When the goods are documented for discharge in an enemy port; or (*b*) for delivery to the armed forces of the enemy; (*c*) when the vessel is to call at enemy ports only; (*d*) or when she is to touch at an enemy port; (*e*) or meet the armed forces of the enemy before reaching the neutral port for which the goods in question are documented.

Cases (*d*) and (*e*) are, it is suggested, new. It comes to this: Goods may, in fact, be destined to a neutral port, and yet because the vessel carrying them touches at a hostile port, they are seizable; the reason being, it may be assumed, the strong temptation to dispose of them to the belligerent. Rarely has such a contention been in recent times put forward by a belligerent. We have got beyond the doctrine of continuous voyage; we are in presence of the doctrine of probable destination of goods. We are not far off that of possible destination.

So much for absolute contraband. For reasons by no means convincing, the doctrine of continuous voyage is not applied to conditional contraband. Art. 33, which deals with *conditional* contraband, declares that goods are liable to capture if they are "destined for the use of the armed forces of a Government Department of the enemy State, *unless in this latter case the circumstances show that the goods cannot in fact be used for the purposes of the war in progress.*" These words are vague in themselves, and may be fraught with grave consequences; they are not made clear or less important by what follows. Art. 34 raises a *presumption* of such hostile destination "if the goods are consigned (*a*) to enemy authorities, or (*b*) to a contractor (*commerçant*) established in the enemy country, who, as a matter of common knowledge, supplies articles of this kind to the enemy, (*c*) to a fortified place, (*d*) or other place serving as a base for the armed forces of the enemy."

Let us consider the effect of these rules upon food-stuffs. And first as to the existing rule, which may be stated in the words of Lord Stowell in *The Jonge Margaretha* (1 C. Rob. 188): "The nature and quality of the port to which the articles were going was not an irrational test," and he added:

If the port is a general commercial port, it shall be understood that the articles were going for civil use, although occasionally a frigate or other ships of war may be constructed in that port. On the contrary, if the great predominant character of a port be that of a port of naval equipment, it shall be intended that the articles were going for military use, although merchant ships resort to the same place; and although it is possible that the articles might have been applied to civil consumption, *for it being impossible to ascertain the final application of an article* ancipitis usus, *it is not an injurious rule which deduces both ways the final use from the immediate destination.*

The present rule on the subject may be thus stated in the words of our Government, when protesting against the extension given to contraband by the Russian Government:

His Majesty's Government could not, however, admit that, if such provisions were consigned to the port of a belligerent (even though it should be a port of naval equipment), they should therefore be necessarily regarded as contraband of war. In the view of His Majesty's Government, the test appears to be whether there are circumstances relating to any particular cargo to show that it is destined for military or naval use.[1]

Professor Holland expresses the rule[2] in these words:

Provisions in neutral ships may be intercepted by a belligerent as contraband only when, being suitable for the purpose, they are on their way to a port of naval or military equipment belonging to the enemy, or occupied by the enemy's naval or military forces, or to the enemy's ships at sea; or when they are destined for the relief of a port besieged by such belligerent (Report of Food Supply Commission, p. 24).

Do the proposed new rules give importers of food-stuffs and the community dependent thereon the protection which they now have, or something less? I am inclined to think something less; how much less one cannot be sure. Do they give the protection afforded by continental authorities? The majority of continental writers, at all events many of them, have been opposed to regarding food-stuffs as contraband under any circumstances, though the practice of continental States has not even in recent times always agreed with them; and there is a tendency on the part of foreign writers to adopt the English view.[3] These rules may protect us against the wide extension sometimes given by belligerents to contraband. Do they ensure to us the necessary minimum of safety as to our food supply? I doubt it.

The effect of these articles upon the importation of food-stuffs is not made less menacing by the commentary upon Art. 34 in the General Report:

What is the solution when the goods are destined for the Civil Government Department of the enemy State? It may be money sent to a Government Department for use in the payment of its official salaries, or rails sent to a Department of Public Works. In these cases there is enemy destination which renders the goods in the first place liable to capture, and in the second to condemnation. *The State is*

[1] Lord Lansdowne to Sir C. Hardinge, January 1, 1904. See also Lord Granville to M. Waddington, February 27, 1885, State Papers, lxxvi. p. 437; and Lord Salisbury's statement, quoted in Moore's Digest, vii. p. 685.

[2] "Which has all but won its way to universal acceptance": Appendix to Report of Food Supply Commission, p. 265.

[3] *E.g.* France in 1885 and Russia in 1904. According to Ullmann, food-stuffs are to be regarded as contraband only if "die Zufuhr unmittelbar einem militärischen Zwecke dient, z. b. wenn die Lebensmittel unmittelbar einer feindlichen Flotte zugeführt werden" (s. 193).

one though it necessarily acts through different departments. If a Civil Department may freely receive food-stuffs or money, that department is not the only gainer, but the entire State, including its military administration, gains also, since the general resources of the State are thereby increased. Further, the receipts of a Civil Department may be considered as of greater use to the military administration and directly assigned to the latter. Money or food-stuff really destined for a Civil Department may thus come to be used directly for the needs of the army. This possibility, which is always present, shows why destination for the department of the State is assimilated to that for its armed forces (p. 48).

This passage affirms or suggests a doctrine which has not in recent times, so far as I am aware, been broached; a doctrine which comes very much to this, that any supplies which are likely to find or may find their way into the hands of a department of a belligerent Government may be treated as contraband. It resembles somewhat a doctrine put forward in defence of the Order-in-Council of June 1793, in the heat of our war with France, declaring all food on its way to that country to be contraband, on the ground that the employment of famine against the whole population was a legitimate means of reducing the enemy to reasonable terms of peace.[1]

I may put a case not wholly improbable: A war between England and some other country breaks out; distress, accompanied by much unemployment, ensues; riots owing to the high price of food take place; the Government purchase and import food both for the fleet and for relief of the civil population; it is presumably contraband if the doctrine suggested in the text is applied, it is certainly such if the doctrine in the report is followed.

Let me note another possible consequence: Hostile destination is presumed by Art. 34 in cases in which food-stuffs go to a "contractor established in the enemy country who, as a matter of common knowledge, supplies articles of this kind to the enemy," or "if the goods are consigned to a place serving as a base for the armed forces of the country." A.B., an importer of flour, is one day supplying the troops at Aldershot, and on another supplying wheat to millers; would not a consignment to him be presumably contraband? I am not sure what "base for the armed forces" means. If it includes, as it probably does, "base of supply," London or Southampton might be held to be the base of our troops at Aldershot.[2]

It may also be pointed out that Art. 34 as drawn has little or no relation to the actual course of trade in grain and food-stuffs and other articles which might be classed as conditional contraband. The framers of these Articles had probably in view a state of commerce simpler and more

[1] American State Papers, i. 240.

[2] It will be recollected that the phrase "base of operations" gave rise to much difference of opinion in the Geneva Arbitration. Colonel James (*Modern Strategy*, p. 16) points out the ambiguity of that phrase and of "base of supply," which in the widest sense may include the whole country to which the army or fleet belongs.

primitive than that which now exists;[1] and their application to present conditions might be difficult.

As an English lawyer, I may be pardoned for having dealt at some length with this matter, vital to a country which draws about four-fifths of its food supply from abroad, and which, as we are informed by the Food Commission, keeps occasionally a supply sufficient only for about seven weeks. This is a matter as to which there should be no possible obscurity. Our interest is clear; our policy should be the same.

Two general observations on the subject of conditional contraband. The doctrine of continuous voyage does not apply to conditional contraband; it is excluded by Art. 35. Consequently, broadly speaking there can be no capture of any such contraband going to continental countries, Switzerland excepted: it will be enough for them to direct consignment to a neighbouring neutral port—in the case of Germany to Antwerp, Amsterdam, Rotterdam, or (if the goods be of small bulk) to Trieste—and forward the goods to their final destination by rail, river, or canal, which can under modern conditions of transport always be done. On the other hand, of course every consignment of similar goods to England will be direct, and, as such, subject to capture. This is not in theory the abolition of the capture of conditional contraband, so far as all continental States are concerned, and its maintenance against England. In practice it might be so.

Further, there is substituted for a clear objective test—the destination of the vessel to be ascertained by her papers, unless they are false or she is out of her course—a subjective and complex test; an inquiry into motives, with necessarily uncertain results. This will appear if I put into a tabular form the suggested tests.

Absolute Contraband.

Destination.

(1) Territory belonging to or occupied by the enemy; (2) or to armed forces of the enemy; in both cases whether carriage of goods is direct or entails transhipment or a subsequent transport by land (Art. 30)—

(*a*) If goods are documented for discharge in an enemy port, or for delivery to the armed forces of the enemy;

(*b*) If the vessel is to call at enemy ports only;

(*c*) If the vessel is to touch at an enemy port or to meet the armed forces before reaching the port for which goods are documented (Art. 31).

[1] Through the courtesy of the Secretary of the London Chamber of Commerce, I have obtained the opinions of a member of the London Corn Trade Association and of a member of the Baltic, both of great experience, who say that the Articles in question "must have been drawn up either with no knowledge or with very slight knowledge of the actual conditions of the trade." See Food Supply Commission's Report, Answers 2517–19.

CONDITIONAL CONTRABAND.

Destination.

(*a*) For the use of the armed forces or of a Government Department of the enemy State, unless in the latter case the circumstances show that the goods cannot be used for the purposes of the war in progress (Art. 33);

(*b*) Enemy's authorities (query whether an example of *a*) (Art. 34);

(*c*) A contractor established in the enemy country, who, as a matter of common knowledge, supplies articles of this kind to the enemy (Art. 34);

(*d*) Goods consigned to a fortified place belonging to the enemy or place serving as base, if found in a vessel bound for a territory belonging to or occupied by the enemy, or if the enemy country has no seaboard (Arts. 34 and 35).[1]

One gain to neutrals may here be noted. Arts. 37 and 38 settle to their advantage and in harmony with continental doctrine a question much debated. It was a moot point whether a vessel which had carried contraband could be captured on her return voyage on the ground of her *delict* in her outward voyage. The decision of Lord Stowell in *The Margaret* (1 Acton 333) was to the effect that such capture was permissible. Art. 38 states explicitly that it is not. I might also include among the gains to neutrals a provision as to the liability of a ship carrying contraband. According to the English rule the ship is condemned if its owner is also the owner of the contraband or if he had knowledge of the contraband character. The Declaration adopts the French rule, according to which the result depends on the proportion of contraband, except that Art. 40 says, instead of three-fourths, more than half either by value, weight, volume, or freight. This, though seemingly harsh, as M. Renault admits, has at least the merit of clearness. I am bound to add that the advantage given by Art. 40 is somewhat cut down by Art. 41, which states that if a vessel carrying contraband is released because the contraband element falls short of one-half, she may be condemned to pay the costs and expenses incurred by the captor in respect of the proceedings in the national Prize Court and the custody of the ship and cargo during the proceedings.

I come next to two omissions from the Declaration. No adequate reference is made either in the Declaration or in the accompanying report to the practice of pre-emption. It had become customary not to confiscate certain articles, *e.g.* articles which are the produce or growth of the owner's own country, and are usual articles of commerce; they were subject to

[1] I make no point of the fact that the tests overlap each other. These tables perhaps show that where simplicity is desirable there will be complexity. The tables do not distinguish between presumptions and complete proofs. Whether in actual litigation these distinctions are always observed, lawyers of experience will judge.

pre-emption. They were, in a sense, captured. But according to English practice, confiscation did not take place; the State, exercising the right of pre-emption, paid freight for the goods thus seized and the cost price, plus 10 per cent. This practice is not recognised. The neutral thus loses a considerable advantage which he enjoyed under English Prize Law. It is true that Art. 43 recognises pre-emption in the case of a vessel which, carrying contraband, is unaware of the outbreak of hostilities or of the proclamation declaring certain articles contraband. This express provision seems to exclude pre-emption in other cases. Art. 44 contemplates seizure of contraband without capture of the ship; there is no mention of payment; it may be destroyed.

This omission may have been inevitable. In any case it is to be regretted. There is force in the contention of many writers that the justifiable ends of belligerents would be attained if there was a right of detention of contraband. I may recall the fact that, in accordance with the general opinion of continental writers, the Institute of International Law in 1896 declared itself in favour of the abolition of accidental or relative contraband, subject to the belligerent's right of pre-emption on payment of an equitable indemnity. I am aware that there are objections to pre-emption, the chief being the increased incentive to ship contraband if there was practically no risk of capture without payment. But I cannot help thinking that the neutral has sustained some loss by the abandonment of this practice.

Upon another point no less important the Declaration is silent. According to the general practice in the seventeenth and eighteenth centuries of countries possessing colonies, it was not open to the subjects of other countries to engage in colonial or coasting trade. When a belligerent, unable to carry on its own colonial trade, permitted the subjects of neutral States to engage in that trade, England claimed the right to capture such vessels. The justification of such a stringent measure as given by Lord Mansfield in *Behrens* v. *Rucker* (1 W. Bl. p. 313), and Lord Loughborough in *Brymer* v. *Atkins* (1 H. Bl. p. 191), was that such neutral vessels had become in effect enemy's property; probably a straining of the facts in order to justify conduct deemed politic.[1] The ground put forward by Lord Stowell in defending the rule of 1756—perhaps more accurately described as the rule of 1789—was that the neutral was availing himself of an advantage given solely by reason of war, and was depriving the belligerent of an advantage which would accrue to him by success in war. "It cannot be contended," he said, in *The Immanuel*:

[1] See as to the injustice of the rule Mr. Justice Story's *Miscellaneous Writings*, p. 486; Wheaton's *Life of Pinkney*, p. 372; Duer's *Marine Insurance*, i. 763 n. The doctrine is, as Story points out (*Miscellaneous Works*, p. 488), a part of an older and more comprehensive doctrine "that every commerce with a belligerent is inhibitive to neutrals; for every commerce assists him in resistance and diminishes his necessities."

to be a right of neutrals to intrude in a commerce which has been uniformly shut against them, and which is now forced open merely by the pressure of war, for when the enemy, under an entire inability to supply his colonies and to export their produce, affects to open them to neutrals, it is not his will but his necessity that changes his system; that change is the direct and unavoidable consequence of the compulsion of war (2 C. Rob. 186).

I am not aware of any important countries which in these days claim a strict monopoly of their colonial trade. But several exclude foreigners from their coasting trade, and give to that a very wide significance. If one belligerent country invited or permitted neutrals to enter into that trade, would the rule of 1756 be applied to them by the other belligerent? We know that Japan in the recent war applied that rule in the case of the United States steamship *Montara*, which had engaged during the war with Russia in the fur trade from which previous to the war foreign vessels were excluded.[1] Eminent authorities who question the justice of the rule as applied to the colonial trade of a country defend its application to the coasting trade.[2] We also know that Germany and certain other Powers were in favour of accepting the rule. Art. 57 seems to centemplate the possibility of the revival of the rule. It states that the flag determines the neutral or enemy character. But it is added, "the case where a neutral vessel is engaged in a trade which is closed in time of peace remains outside the scope of this rule, and is in no wise affected by it." In short, the question remains an open one. It is, I think, to be regretted that this question was not settled one way or other, in view of the policy of certain countries not merely to monopolise their coasting trade, but to give to it a very wide meaning. At the same time, I have grave doubts whether a belligerent would court the consequences of the strict enforcement of such a rule. We must not forget that few neutrals in 1789 had powerful fleets, that modern military and naval science has put into neutral hands such weapons as torpedoes and submarine mines and, it may be, aerial instruments which no belligerent can afford to despise. There always exists in these days, if belligerent claims are pushed too far, a potential and formidable armed neutrality.

I do not propose to say much as to the doctrine of continuous voyage and the various stages of its evolution, which others will discuss. It is remarkable that a rule which as now formulated we did not think fit to enforce in wars in which we were fighting for existence, or during the Russian war, when goods were imported wholesale into Russia *viâ* Dantzic and other German ports, should now come into operation. It is no less remarkable that it should be adopted by a Government which two years before was in favour of the total abolition of contraband. I grant that, from the point of view of the belligerent, much is to be urged in favour

[1] *Das Japanische Prisenrecht*, Dr. K. Mastrand-Mechlenburg, p. 920.
[2] *E.g.* Mr. Justice Story, *Life*, i. 287.

of such an extension. His object is to intercept goods which may assist his adversary; and their destination and not that of the ship, it may be said, should determine their fate. Contraband, it is urged, will slip through his fingers in these days of railways and improved land communication if he cannot seize goods which go to the enemy *viâ* a neutral port. Obstructed by modern rules as to effective blockade and as to immunity of enemy goods carried on neutral ships, he naturally seeks to recover lost ground in two ways: by increasing the number of articles of contraband and by adopting the doctrine of continuous voyage. I admit that there is a strong temptation to make this extension; but its recognition gives great scope to the action of belligerents. It also substitutes a vague test for one that is plain. Restrict contraband to traffic direct with belligerent ports, and the position of neutrals is clear. Depart from that principle, and there must be uncertainty.

VI.—UNNEUTRAL SERVICE.

Chap. iii. relates to "Unneutral Service." Art. 45 (1) deals with voyages "specially undertaken with a view to the transport of individual passengers who are embodied in the armed forces of the enemy, or with a view to the transmission of intelligence in the interests of the enemy."

Art. 45 (2) applies to cases in which "to the knowledge of either the owner, the charterer, or the master, she is transporting a military *detachment* of the enemy, or one or more persons who in the course of the voyage directly assist the enemy." Here there is a relaxation of the rules laid down by Lord Stowell in such cases as *The Orozembo* (6 C. Rob. 430), where he held that "number alone is an insignificant circumstance"[1] and that ignorance on the part of the master and, apparently, of the owners of the vessel, of the military character of the passengers will be no exculpation.

Under the new rule the carrying of one or two passengers who are on their way to assist the belligerent will not endanger the vessel, not even if the one or two comprised officers in high command.

It is not clear what is meant by "embodied in the armed or naval forces" in Art. 45 (1). As to this phrase the report says (p. 53):

> Does it include those individuals only who are summoned to serve in virtue of the law of their country, and who have really joined the corps to which they are to belong? Or does it also include such individuals from the moment when they are summoned and before they join that corps? The question is of great practical importance. Supposing the case is one of individuals who are natives of a continental State and are settled in America; these individuals have military obligations towards their country of origin; they have, for instance, to belong to

[1] "Since fewer persons of high quality and character may be of more importance than a much greater number of persons of lower condition." In the case before the Court it appeared that three officers were on board.

the reserve of the active army at war, and they sail to perform their service. Shall they be considered to be embodied in the sense of the provisions which we are discussing? If we judged by the municipal law of certain countries, we might argue that they should be so considered. But, apart from reasons of pure law, the contrary opinion has seemed more in accordance with political necessity and has been accepted by all in a spirit of conciliation. It would be difficult, perhaps even impossible, without having recourse to vexatious measures to which neutral Governments would not willingly submit, to pick out among the passengers in a ship those who are bound to perform military service and are on their way to do so.

Clear and conclusive answers to these interesting questions are not forthcoming; and it is not quite certain that a hundred steerage passengers returning home without concert in the same ship, in obedience to a call for their military service by their native country, would not be held to be within the terms of this article.

VII.—DESTRUCTION OF NEUTRAL PRIZES.

Art. 48 lays down as a general rule that a neutral vessel which has been captured may not be destroyed, but must be taken into port for adjudication. To this there is a comprehensive exception: "A neutral vessel which has been captured by a belligerent warship, and which would be liable to condemnation, may be destroyed if the observance of Art. 48 would involve danger to the safety of the warship or to the success of the operations in which she is engaged at the time" (Art. 49). This is qualified by Art. 51; it is incumbent upon the captor to prove that he only acted in presence of an exceptional necessity such as is contemplated by Art. 49. There is a further restraint in the rule (Art. 53) that if neutral goods, not liable to condemnation, are destroyed with the vessel, the owner is entitled to compensation.

Whether a right of action or claim against a foreign Government, to be prosecuted at his own expense, would be satisfactory or always of much value to the aggrieved owner, is open to question. Even with these limitations the liability to abuses and the temptation to sink and burn may be great. Obviously, such rules would have sanctioned the operations of the *Alabama*, which, having no ports of her own open to her, systematically destroyed all vessels captured by her. It may be broadly stated that the cruisers of nations having no ports convenient or near would often, if not generally, sink or burn their prizes, and for obvious reasons. Under the Convention of 1907 as to Neutral Rights and Duties in Marine War (Convention XIII. Art. 4), a belligerent may not set up a Prize Court in neutral territory. Nor may a prize be brought into a neutral port (Art. 5) except on account of unseaworthiness, stress of weather, or want of fuel and provisions; and it must leave as soon as the circumstances which justified its entrance have ceased (Art. 21 of Convention XIII.). I am inclined to think that a Court

in applying such a rule as the above might interpret it in one way as to a State having colonies scattered all over the world, and consequently facilities for obtaining an adjudication, and in another way as to States which had no colonies or few, or only colonies lying remote. A tribunal might fairly say that it was legitimate for a Russian commander to burn prizes captured, say, in the Red Sea, but that similar conduct in the same waters on the part of a British cruiser, never more than a few days' steaming from a British port, the possible seat of a Prize Court, was unreasonable. I need scarcely add that if the "operations" in which a cruiser was engaged consisted of preying upon merchant vessels and avoiding conflicts with ships of war, almost every capture of a neutral vessel would result in her destruction; a commander could not reduce his fighting strength by drafting successive crews on board his prizes.[1]

The English representatives, alive to this risk, endeavoured to obtain a declaration that mere inability to provide a prize crew was not an element of danger within the meaning of Art. 49. They failed. Their failure is significant.[2]

VIII.—TRANSFER OF PROPERTY.

Chap. v. relates to transfer of ships to a neutral flag. Here, too, differences have existed between our law and that of continental countries, and the Declaration adopts a compromise. The English rule is as follows: Sale of a ship is not invalid by the mere fact that it has been effected during hostilities or in contemplation of them. But it will be null if it is effected in a blockaded port, or in the course of the voyage, or if there is a reservation of any share or a right of repurchase. The onus of proving the *bona fides* of the sale lies upon the claimant (Memorandum, p. 40). The French rule is: "Le changement de nationalité des navires de commerce effectué après la déclaration de guerre est nul et sans effet. Le transfert antérieur à la déclaration de guerre, régulièrement intervene, est valable" (Memorandum,

[1] See evidence of Sir Cyprian Bridge before Food Supply Commission, answers 11, 281, 11, 391.

[2] It is right to notice, as pointed out by Mr. Thursfield (*Trafalgar and other Studies*, p. 232 *et seq.*) that there is another side to the matter. Destruction of prizes "entails the loss of all prize money in respect of the ships so dealt with, and thereby eliminates one of the strongest motives which actuated the commerce destruction of the past. But, besides this, it requires the assailant to offer the hospitality of an already overcrowded ship to the crews of the vessels thus disposed of." The writer pictures the predicament of a cruiser which had captured an Atlantic liner, and must, consequently, take on board, feed, and house 2,000 to 3,000 persons.

I may point out that from early days it was found necessary, in consequence of manifold abuses, to prevent the destruction of vessels so as to avoid adjudication. The *Ordonnance de la Marine* of Louis XIV. contains strict prescriptions as to this (Valin, *Traité de Prises*, c. ix.). It is to be noted that power is taken under Art. 34 to destroy goods liable to condemnation, provided the circumstances are such as would justify the destruction of a vessel liable to condemnation.

p. 31). The English rule is theoretically not so strict; in practice it probably comes to much the same.

It is a strange thing, if one comes to think of it, that neutrals should be prevented from purchasing ships at such times as they think fit, irrespective of the interests of belligerents. But neutrals, we are told, must give way; higher considerations are here paramount: as an eminent judge, who never so far as I know indulged in irony, has said, "it is utterly impossible to enforce the belligerent rights of this country, except upon general principles, and all attempts to go upon purely equitable principles, particular decisions, and particular cases, without regard to the great principles, can only have the effect of destroying the right, and rendering it no longer worth the exertion which Great Britain used in times past for the purpose of protecting it" (Dr. Lushington in *Baltazzi v. Ryder*, 12 Moore P.C.C. p. 180). So much for "purely equitable principles."

As to ships, the general rule is that "the transfer of an enemy vessel to a neutral flag, effected before the outbreak of hostilities, is valid, unless it is proved that such transfer was made *in order to evade the consequences to which an enemy vessel, as such, is exposed*"; obviously a difficult matter of inquiry. This right of transfer is cut down by the words which follow:

(*a*) There is a presumption if the bill of sale is not on board a vessel which has lost her belligerent nationality less than sixty days before the outbreak of hostilities that the transfer is void. This presumption may be rebutted.

This same Art. (55) proceeds—

(*b*) Where the transfer was effected more than thirty days before the outbreak of hostilities, there is an absolute presumption that it is valid if it is unconditional, complete, and in conformity with the laws of the country concerned, and if its effect is such that neither the control of nor the profits earned by the vessel remains in the same hands as before the transfer.

(*c*) If, however, the vessel loses her belligerent nationality less than sixty days before the outbreak of hostilities, and if the bill of sale is not on board, the capture of the vessel gives no right to damages.

Thus in sales of ships before hostilities there are three classes:

(*a*) Sales effected more than thirty days before the outbreak of hostilities, if unconditional and complete and in conformity with the laws of the country, and the bill of sale on board: valid.

(*b*) Such sales, if made less than sixty days before the outbreak of hostilities and bill of sale not on board: presumably void, but presumption rebuttable.

(*c*) Sales under class (*b*), if presumption rebutted, no right to damages.

Art. 56 deals with transfer effected *after* outbreak of hostilities. Here the presumption is reversed. Transfer is presumably "void unless it is proved that such transfer was not made in order to evade the consequences

to which an enemy vessel, as such, is exposed." There is an absolute presumption of voidness—"(1) if the transfer has been made during a voyage or in a blockaded port; (2) if a right to repurchase or recover the vessel is reserved to the vendor; (3) if the requirements of the municipal law giving the right to fly the flag under which the vessel is sailing are not complied with."

The transfer of goods is dealt with partly, but only partly, by Arts. 58, 59, and 60. The first states that the neutral or enemy character of goods found on board an enemy vessel is determined by the neutral or enemy character of the owner; but whether his character depends upon domicil according to the Anglo-American view, or nationality according to the continental, is left unsettled; it was impossible to arrive at an agreement. The articles annul the Anglo-American rule that "the possession of the soil does impress upon the owner the character of the country, as far as the produce of that plantation is concerned, in its transportation to any other country, whatever the local residence of the owner may be."[1] We are left in doubt, however, whether Courts will apply the complicated rules and abstruse learning of the books as to commercial domicil, and whether, as seems be now possible, a man may have two domicils, and consequently be liable to have his property captured by two belligerents.

Art. 60 adopts the English rule: "Enemy goods on board an enemy vessel retain their enemy character until they reach their destination, notwithstanding any transfer effected after the outbreak of hostilities while the goods are being forwarded." It will be thus seen that there is a distinction between the sale of goods and that of ships: while the transfer of the latter during hostilities is not always and necessarily void, all such transfers of goods are null, the reason given being, in the words of the report, "the ease with which enemy goods might secure protection from the exercise of the right of capture by means of a sale which is made subject to a re-conveyance of the property on arrival has always led to a refusal to recognise such transfers" (Report, p. 61).

In one respect the new rule departs from the English rule; though not recognising liens, charges, etc., it recognises the right of stoppage *in transitu* in favour of a former neutral owner.

IX.—CONVOY.

Chap. vii. relates to convoys; as to which there has been a long-standing difference between England and continental countries, and one for which she battled stoutly in past times. She has hitherto declined to admit that the existence of a convoy was a ground of exemption from search (see the case of the *Elsabee*, 4 C. Rob. 408). This is now waived. Probably the concession is of small value; the practice of convoying

[1] Lord Stowell in *The Phœnix* (3 C. Rob. 21).

merchant vessels, once a marked feature of maritime trade, has lost its importance. It will be noted that the commander of the convoying squadron is apparently bound to give "all information as to the character of the vessels and their cargoes which could be obtained by search." Search would, of course, be a verification of the truth of the documents; whether this is intended I cannot say. No provision is made for what may happen if the commander has been misinformed or has been negligent as to the existence of contraband.

Chap. ix. makes provision for compensation if there were no grounds for seizing the vessel or cargo. There is no stipulation as to when compensation is to be paid—a matter of some consequence. Some Governments are unfortunately tardy, if not bad payers. Probably the Court, in its judgment, will give directions as to this point.

X.—SEARCH.

Chap. viii. deals with resistance to legitimate search. This involves in all cases the condemnation of the vessel. "The cargo is liable to the same treatment as the cargo of an enemy vessel," *i.e.* the neutrals who have cargo on board will be able to claim it under Art. 3 of the Declaration of Paris. Goods belonging to the enemy being on an enemy vessel will be confiscated. The same fate will befall goods belonging to the master or owner of the vessel.

CHIEF CONCLUSIONS.

I state briefly my chief conclusions. They are these:

That before the Declaration there prevailed much confusion, uncertainty, and diversity of opinion and practice as to the rules to be applied by Prize Courts;

That the Declaration has harmonised and reduced to unity these rules, and has thereby facilitated the work of Prize Courts, national as well as international;

That this is a great improvement upon the proposal contained in Art. 7 of the Convention for the Establishment of an International Prize Court, according to which "if no generally recognised rule exists, the Court shall give judgment in accordance with the general principles of justice and equity";

That many of the Articles of the Declaration are the result of compromises between conflicting doctrines, and that some of its defects are due to this circumstance;

That the commentary contained in the General Report, while possessing a certain degree of authority, is not in all respects in full agreement with the Declaration;

That the rules as to blockade are in the main reasonable; they effect a compromise between the interests of belligerents and neutrals, and between the Anglo-American and continental rules on the subject;

That these rules do not provide against possible measures in the nature of blockade by means of mines and otherwise, which might prove prejudicial to neutrals;

That, while reaffirming the modern doctrine that a blockade to merit respect must be effective, there is no security that the range of operations of a blockading squadron may not, under modern conditions of warfare, be so extensive as to impede the movements of neutrals;

That absolute contraband receives in effect an extension;

That the provisions for notice and for an appeal in the case of an addition to the list of absolute contraband are beneficial;

That conditional contraband is retained contrary to the opinion entertained in several countries;

That the existence of a free list is a distinct benefit to neutrals—a benefit which would be increased if there were provision for periodical revision at short intervals;

That, owing to the facilities which continental countries enjoy for receiving goods consigned to the ports of neutral countries, there will be practically no prohibition of the importation of conditional contraband into continental countries; that prohibition will exist only in the case of insular countries, such as England and Japan;

That the rules would tend to prevent the repetition of action in regard to contraband such as that of France in 1885 and Russia in 1904;

That it is vital to this country that the legal position of food-stuffs should be clear; that the present rule, as recognised by English law, is fairly well settled and reasonable; that their position will be somewhat uncertain under the proposed new rules;

That the practice of pre-emption, which protected belligerents against importation of contraband while it shielded neutrals against spoliation, is not retained;

That the rules as to destruction of neutral prizes may operate prejudicially to neutrals, and, it may be, inequitably as between different belligerents;

That there will be in many cases a strong temptation to sink or destroy neutral prizes, and that such conduct will be often justifiable in the case of States having few or no colonies;

That the rules as to transfer of ownership, instead of being simple, as is desirable, are complex;

That some of the rules as to contraband and as to transfer of property adopt subjective tests as to intention which must necessarily give rise to uncertainty and controversy;

That important questions are left unsettled; the test of enemy character of owners is undetermined; and no clear light is thrown upon the

question, interesting in view of existing restrictions, whether the Rule of 1756 may be applied, and if so, to what extent or under what conditions.

I submit these considerations with diffidence. Whether the Declaration should be ratified with or without reservation is a question which I do not presume to answer. This much I may say: With all its defects the Declaration marks progress; the agreement by the representatives of the chief States of the world as to so many points long disputed means much for the future.

MARRIAGE AND LEGAL CUSTOMS OF THE ẸDO-SPEAKING PEOPLES OF NIGERIA.[1]

[*Contributed by* NORTHCOTE THOMAS, ESQ.]

THE Ẹdo-speaking peoples of the Nigerias, of whom the inhabitants of Ẹdo, commonly called Benin City, are the best known representatives, occupy an area, roughly rectangular in shape, with its long sides pointing N.N.E., between Wari in the south and a line running from Isua in the Kabba Province, N. Nigeria, to Ida on the Niger, in the north; the total length is about a hundred and forty miles and the extreme breadth eighty miles. On the south the tribes are fringed by the Ijọ; the Šekri intermingle with them on the south and west; on the west and north they have the Yoruba and their kinsmen, the Akoko; and to the east of the Akoko, the Igbira, who appear to have occupied the west bank of the Niger to the north of the Ibo in former times, but are now forced upwards, leaving some of the riparian area (from Agẹnẹgbọdi opposite Ida to Jigolo, often known as Iluši) to the so-called Kukuruku, who claim descent from the Sobo, now the most southerly representatives of this family of languages; from Jigolo the frontier runs diagonally in a south-westerly direction with the Ibo and allied tribes across the border, whose southern neighbours are again the Ijọ, a riverain people intermingled to some extent with the land tribes belonging to other stocks.

The Ẹdo-speaking family is divided into a few large and numerous small linguistic areas; the larger areas again are in some cases further subdivisible, the final result being a considerable number of distinct languages and dialects.

The largest and most homogeneous people in the family is the Ẹdo tribe proper, commonly called Bini, though they do not accept the name; and so far as I can judge, the differences of language are small over the whole kingdom. North-east of the Ẹdo lie the Esa (Ishans), formerly subject to them and more nearly allied to them in language than the other branches of the family; south of them lie the Sobo, with several languages and dialects but forming a stock which is physically fairly homogeneous. Finally, north of the Ẹdo and Esa (Ishans) lie a congeries of tribes to which the name Kukuruku is often applied.

[1] The materials for the following paper were collected in the Nigerias during my tour as Government Anthropologist in 1909-10.

In the south-west of the Kukuruku area is the Ọra group, larger and more homogeneous than any other; east of them lie linguistic groups, which are often contained in a single village, with languages sometimes unintelligible to their nearest neighbours; farther towards the Niger again the linguistic groups become larger, and in the Wefa country opposite Ida is a considerable population, claiming descent from a Sobo ancestor, with a common speech, which is also intelligible in Fuga and Uzaitui.

With such diversities of language it would be strange if there were not also great variety of custom and belief. The following pages will sketch the variations in marriage customs among the Ẹdo-speaking peoples; to avoid misapprehension, it may be added that these variations are more pronounced in the case of marriage than in almost any other branch of custom and belief.

In the Sobo country the differences are mainly in the ritual leading up to the marriage, and in the regulations affecting the early months of married life; in the remainder of the area differences of status of the wife and children overshadow these ritual diversities and are, from the legal point of view, vastly more important. These differences may be summed up in the statement that there are two kinds of sexual relationships known—marriage (known as *amoiia* union in the Kukuruku country) and concubinage (known as *isomi* union). These two forms may be found side by side, one or both being legally recognised; if only one form is found, it is rather what we should call concubinage than marriage. These statements may now be exemplified.

In the kingdom of Ẹdo, now the Benin City District, a suitor may apply to a girl's father for her hand when she is quite small; or, if she is not betrothed then, some one may present himself when she is already marriageable. In either case payments either in money or in kind are required from the suitor, and, in addition, when the bride is young, the suitor does a certain amount of work on the farm of his future father-in-law and helps him in such tasks as house-building. A further duty that falls upon him later is attendance at the funeral of his father-in-law with contributions in kind to the expenses of the burial, of which the main feature is dancing.

The wife acquired by payment of bride-price is the absolute property of the husband; her children are his property and the eldest son is one of his heirs, or his sole heir if there is only one wife. The widow, if she has borne no children, passes to the son or brother of the deceased man. Adultery is a punishable offence, and the co-respondent may be mulcted in damages. The name given to a wife for whom bride-price is paid is *ame*, and the Ẹdo believe that a purchased wife who fails to go to her legal husband will have to stand behind his chair in *elimi* (heaven) and serve him.

Side by side with this legally recognised form of sexual relationship is an irregular one in which neither of the parties has rights or duties, and

the children belong, at least in theory, to the woman's father, unless the relationship is subsequently regularised by purchase. In one case which came under my notice a girl bore two children to her lover, and was eventually purchased; at the outset lack of means had stood in the way of an ordinary marriage. In another case a widow went to live with a man in her father's village, but her father declined to recognise it as a marriage; she had borne a son to her first husband and this son was with her father: the case is therefore doubly curious. Probably investigation would have shown that the first "husband" had never completed the purchase; hence the son went to the woman's father; if she was not a widow, the husband *de facto* was bound to secure her by purchase; and in the absence of payment, the father refused to recognise him; the children would naturally remain in the house which was the common residence of the woman and her mate.

These same conditions—the regular marriage bond and the liaison—prevail to the north of the Ẹdo tribe, in the Ifon District, save where, as at Ọkpe, the irregular tie is not permitted at all. It is not till we get to the kingdom of Agbẹdẹ, in the Ishan District, that a change becomes noticeable. At Idegun, east of Agbẹdẹ, it is rare for a father to take the bride-price from a suitor born in Idegun, though there is no objection to his accepting it from an alien. Consequently the majority of marriages in Idegun are of the type which we have called concubinage. The situation, however, is so far regularised, both here and elsewhere among the Esa, that in many cases the children of such a union are shared between the woman's family and that of the father. We may safely regard this as due to the influence of the marriage customs of the Kukuruku of Ida.

From Agẹnẹgbọdi westwards as far as Auči there are two recognised and legal methods of taking a wife, or, if we include the marriages in which the two parties are not of the same country, three.

Corresponding to the *ame* of Edo, we have the *amoiia* wife; she is purchased in youth, often as a result of the decision of a diviner, and frequently passes at once into the possession of the husband. Her children are the heirs of the husband, subject to the exceptions noted hereafter; at the death of the husband she remains in the family, and adultery with her was punishable by slavery or a fine of seven slaves.

In contrast to this, we have the *isomi* wife, who is, as a rule, acquired at a more mature age, though not necessarily at a lower price. At her husband's death she is free to go back to her own people; she may do so in his lifetime, subject to the condition that if she has borne him no children the bride-price must be repaid. If she dies, she must be sent back to her own family to bury—a rule that also prevails in Ọkpe in the case of a woman who leaves the community and takes a husband in another country. If her children die, they too must be buried by their mother's father, though occasionally the father seems to be gaining rights over them at the expense of his wife's family.

Adultery with an *isomi* wife is punishable very lightly; and the children of an *isomi* wife have to look to their mother's family for their heritage, save in two cases.

In the first place, a man may take the child of an *isomi* wife and pay the £30 necessary to make him a chief, a position formerly highly coveted owing to the immunity conferred by it against assault or imprisonment in daily life, or death or capture in war, but now coveted in the main because the fees of new chiefs are divided among the already existing *oke*. If a son is created chief by funds provided by his father, he is entitled to become his father's heir, provided he fulfils the other conditions, such as that he must have joined the *otu* or society of young men.

In the second place, after his father's death a man may elect to remain in his father's country, and by so doing he becomes *ipso facto* entitled to a share of the property. If, however, he subsequently removes to his mother's country, an action will lie against him for the return of the inherited property, especially of any widows whom he has received.

Occupying a position to some extent intermediate between the *amoiia* wife and the *isomi* wife is the *ẹnabọ* wife, a stranger from an alien land, for whom as a rule little or nothing is paid, but whose children remain with the father, and are on the same footing as those of the *amoiia* wife. On the other hand, if the husband dies, the *ẹnabọ* wife is free to go back to her own people.

In the matter of betrothal of daughters a man is free to dispose of those by an *amoiia* wife, either in *isomi* or *amoiia* marriage; if, however, they are by an *isomi* wife, the wife's father has a claim on a share of the bride-price.

Over the border, in the Ibie country of Northern Nigeria, as for example at Opẹpẹ, we find the same conditions prevail; but here there seems to be a franker recognition of the fact that the *isogo* (=amoiia) wife is unfree, though in reality the position is the same elsewhere, inasmuch as no freedom of choice is ever left to the girl and the price cannot be repaid even if her husband is distasteful to her. The custom was, however, so far different that an *isogo* wife was always acquired from her owner, never from her father and mother.

The *ẹnabọ* marriage is also found here; but there is the curious proviso that a widow must either marry her husband's brother or return to her own country.

In the Upila country at Kọminio we again find the two contrasted types, *ateme* (=isomi) and *onawateva* (=amoiia); but here the *ateme* wife is not, as has been the case in all the tribes dealt with so far, brought to her husband by conductors chosen from the families of her father and mother: the suitor calls together the men of his own company (*otu*) and they carry off the bride; according to another account, the husband's family carry her off.

At Soso the conditions are essentially different; the inhabitants are immigrants who fled from their original home before the Nupe raiders. The custom of child-marriage prevails here in a pronounced form, and, contrary to the usual custom, consummation takes place long before puberty, evidently a result of the original scarcity of women, another testimony to which is the rule that no woman leaves Soso to go as a wife to another country, though wives are brought in from outside as elsewhere.

The ordinary or *ofiko* wife is free to leave her husband if she dislikes him, and arbitrators fix the amount of the bride-price to be repaid for a truant wife who has borne no children. The *ofamisi* (= ẹnabọ) wife is in like manner free to go when she has borne a child, and in both cases the children belong to the husband. Here, therefore, concubinage alone is found, but the children are in the position of the descendants of an *amoiia* marriage in the country to the south.

At Sẹmolika much the same conditions prevail, save that marriage is postponed till puberty. A wife is fetched home by her husband's friends, but her own family accompany her, and the two customs already noted are combined.

Sẹmolika is not very distant from Ọkpe, and in more than one point there is a resemblance between their customs. Punishment for adultery is unknown in both localities; but the injured husband must seek out the wife of the co-respondent and do likewise before the palaver can be considered at an end. If the co-respondent has no wife, the husband may wait till he marries, and in case of his death the duty devolves on one of his brothers; or a wife of the co-respondent's brother or father may serve as a substitute for the wife of the co-respondent. No member of the offender's family may object to the due performance of the custom, even though he himself is, as it were, a scapegoat for his brother's misdeeds.

In the Sobo country, as already noted, the conditions are essentially different. The wife here is the purchased wife, who is the property of the husband. The chief difference in ritual is that after the marriage the wife remains in her father's house for a longer or shorter period; her husband comes to the house at night and returns to his own house or village at dawn; at the end of about three months the wife is sent home in the ordinary way. This practice is a curious variation of a better-known custom in which the husband and wife reside with the wife's parents for a time and then remove; it also stands in close relationship to the custom which demands that till a child is conceived or born, the husband may only visit his wife by stealth. In the Sobo country the husband eats food in the house, and there is no concealment.

In some parts, as a variation, the wife goes to her husband's house, but returns to her father's house for varying periods, often more than once; we may regard this practice as a derivative of that just mentioned. No explanation was ever given to me of either; but as a wife sometimes returns

to her father's house to bear a child, we may probably regard both customs as variants of MP. marriage.[1]

One or two further points may be noted. In parts of the Esa country a daughter is sometimes compelled or permitted to occupy her deceased father's house, and to receive there as many lovers as she chooses; at her death the house becomes the property of one of her children.

The customs with regard to illegitimate children born to a woman before marriage occasionally illustrate the indifference to paternity which is characteristic of some uncultured races. Such a child often goes with the woman to her husband, whether he is the father or not; and it is by no means infrequent for such a child to reckon as the eldest son and take all the property, to the exclusion of the children begotten by the husband. With posthumous children the custom varies; sometimes it is the heir of the father *de facto*, sometimes such a child takes its place among the children of the second husband, ranking according to age.

Closely connected with the subject of marriage is that of the inheritance of property. The general scheme of inheritance among the Edo-speaking peoples is that the children of a man are his heirs; but this is liable to important modifications on some points.

Before dealing with these it may be said that where the children succeed there are, broadly speaking, three possibilities. In the first place the property may be divided among all the children; this is rare. In the second place it may be divided among the sons; this also is not common. In the third place it may go to the eldest son; and this is the normal course of events. This broad scheme, however, must be limited in more than one direction. In a country where polygyny is the rule, two-thirds of the married men in some districts having more than one wife, it often happens that the eldest son of each wife gets a share of the property, though not so large a share as the eldest son of the head wife.

Again, if the sons are all minors, the father's brother may be the heir, or he may act as guardian; or, finally, he may hold an intermediate position, with authority to sell or otherwise deal with some of the property, and the obligation of accounting for the remainder, or with only a nominal position as guardian and practical freedom to use the inheritance for his own ends.

Turning now to the cases in which the eldest son is not the heir, even though he has, according to our conceptions, reached manhood, we find that they fall under three heads.

In the first place, if the father has no *amoiia* wife and does not make an *isomi* son a chief, the latter is not his heir; he succeeds to the property of his mother's brother, unless he elects to remain in his father's country.

[1] I suggest this term (MP.=matrilocal—patrilocal) in the place of "removal" marriage, to indicate that a change of residence takes place from the wife's group to the husband's.

In the second place, he is not even then the heir, unless two other conditions are fulfilled, which also apply to the son of an *amoiia* wife. He must have joined *otu*, one of the companies of young men, which is entered between the ages of twenty-five and thirty among the Kukuruku of Ida, where this regulation is found; not only so, but he must be the eldest in the family made up of his father's brothers and nephews, otherwise one of the latter takes the property, to be succeeded later perhaps by the actual son of the dead man.

In the third place it may happen that a child who is not the son of the dead man, nor even of a member of his family, may in some communities become his heir. The position of posthumous children is not well defined, or rather it is subject to variations from place to place. Occasionally, however, a posthumous child reckons as the eldest son of the second husband, though the ordinary rule is that a widow must wait for a year before re-marrying. Similarly, an illegitimate child brought by a woman to her husband seems occasionally to rank as his eldest son, even though he is not its father. Finally, in what I term "penal adoption" a child of another family may take a deceased man's property to the exclusion of his own children.

Over a considerable part of the territory of the Edo-speaking peoples it is the rule that a murderer must suffer death, unless he or his family can hand over two persons to the family of the deceased man. If they can find these two persons, the latter enter the family of the deceased man; they are liable to all the restrictions with regard to marriage which fell upon him, and sacrifice to their adopted not their real parents. In some districts if the adopted child takes the place of the eldest son, he is also the heir, but this rule is not invariable.

As regards the position of women in matters of inheritance, there is less to be said. Daughters occasionally share jointly with sons; sometimes they are heirs in the absence of sons; but the ordinary rule is that they can only take certain kinds of property, such as beads or cloth; and the gift of these may be left to the discretion of the male heir or heirs.

A woman's property is inherited as a rule by her children, sons and daughters or only sons; in their absence the husband is sometimes the heir, more often the property goes to the brothers or sisters of the dead woamn. It may be added that a wife never succeeds to her husband.

The only kind of adoption which has any effect on inheritance of property besides the above-mentioned penal adoption is limited to certain communities. It is sometimes the practice for a childless woman, if she has much property, to make the king of a people her heir; he is then under the obligation of burying her and of course takes her property.

In connection with inheritance something must be said with regard to the descent of land. As a rule land is communal; it passes into private

hands when it is cleared and cultivated; but when the normal two years of cropping is over, it is allowed to lie fallow and the former cultivator has no claim to it, though kola trees may remain in his hands if he maintains a small clearing round them. In the Sobo country, however, land is owned by families as a rule, though there is land also within the village territory which is still communal and can only be used if it is granted by the chief. Each "great family" has its own area, however, from which it clears a large farm each year, the clearing being subsequently shared among individual cultivators. Married men have their own small farms; unmarried sons usually cultivate jointly.

In the north of the Edo-speaking territory private ownership is occasionally found; and sometimes the headman of the community is regarded as the owner. At Soso, bought land and inherited land descend according to different rules.

Reaches of rivers and fish swamps are in some parts private property; but it is rare for these tribes to live near the water and such cases are infrequent.

Many trees are private property, especially kola and cocoanut; if they are found in the bush they may be made private property by the finder, if he wishes. Oil palms, on the other hand, are rarely private property; and at Otua I was told that they were now communal, though formerly private property in them was universal, and at no very distant date.

Both trees and land may be sold in some places; pawning is also permitted, and it is natural that the areas in which this occurs should be those in which private property in land is most developed. Where uncultivated land is communal, it is rare to find the sale or leasing of trees, though private property in the latter is fully recognised.

On the whole, one is struck by the differences between adjacent areas and even between villages of the same district. Unless the Edo-speaking peoples are exceptional, the task of giving an adequate account of the customs of a people low in the scale of culture is a more difficult one than is commonly supposed. The tendency of anthropology is towards the intensive study of small areas, and the results of my recent tour fully justify this attitude.

THE MODERN CONCEPTION OF CIVIL RESPONSIBILITY.

A STUDY OF COMPARATIVE LAW.[1]

[*Contributed by* P. B. Mignault, Esq., K.C. (*Montreal*).]

It is perhaps only natural in this industrial and inventive age that questions of liability for accidents, and generally of the responsibility for civil torts, should engross the attention not only of jurists, but also of economists and sociologists. The conditions of life are changing every day, new forces of nature are being discovered and developed, and we are environed by perils our fathers did not even dream of. The industrial employee has become but a piece of living mechanism, surrounded by rapidly moving machinery of tremendous power, and the utmost care will not, and cannot, prevent the occurrence of disastrous accidents. Old safeguards are now discarded for new ones of possibly doubtful utility, and the necessity of rapid production has induced both operatives and employers to take chances and to trust to Providence to escape danger. Statistics teach us that the soldiers of industry furnish more victims than the soldiers of war, that, according to the law of averages, a certain—and, I think, largely increasing—proportion of workers are sure to succumb, and that in some occupations the limit of human life is considerably shortened.

It is obvious that old rules of liability, devised at a time when production was slow, when tools were set in motion by the workman who used them, are necessarily inadequate to meet the modern conditions of industry. To adhere blindly to these rules would appear as unwise as to expect wooden ships of war to withstand the artillery of our day. The law must necessarily advance to be a living system, but its progress is generally deliberate and slow. And in the domain of legislation experiments are not always successful, and there is, and has always been, a tendency to stretch an old rule rather than to frame a new one. The result has been—and I think it was an inevitable result—that there has been an undue straining in some countries of old canons of law, while elsewhere a spirit of conservatism and a too rigid jurisprudential system have rendered any progress impossible save

[1] Read at a Conference of the International Law Association at the Guildhall, London, August 3, 1910.

by new and often untried legislation. I think that no more interesting study can be made in comparative law than a study of the means employed under different systems of jurisprudence to meet and cope with new situations. And I shall make bold to-day to crave your attention and your kind indulgence while I consider the questions of civil liability which have arisen, more especially in France and in England, during the last quarter of a century. I can hope to say nothing new, while I must perforce repeat what has been said, and admirably said, by others; still the subject is of itself so interesting, palpitating as it does with human interest, that I flatter myself that any repetitions will not prove distasteful.

The classic rules governing civil responsibility, since the days of Rome, are that there is no liability without a fault, and that he who uses his own right injures no one. The laws of both France and England, with regard to torts, were based on this fundamental notion, which for ages was applied without any apparent difficulty or complaint. But the world has moved: and the new situation which I have mentioned has demanded a solution. I will answer the simple question: how was that situation met in France and in England? In other words, how did the civil law on the one hand and the common law on the other solve the same problem?

In France, for centuries, and more especially for at least seventy-five years after the Civil Code was enacted, the rule was the same as in England, and negligence or fault was the all-essential condition of an action *quasi ex delicto*. This rule is well stated in Art. 1382 of the Code Napoléon: "Tout fait quelconque de l'homme, qui cause à autrui un dommage, oblige celui par la faute duquel il est arrivé à le réparer."

The following articles of the Code seem merely to amplify and illustrate this simple rule. Thus Art. 1383 states that "chacun est responsable du dommage qu'il a causé, non seulement par son fait, mais encore par sa négligence et par son imprudence." And the first paragraph of Art. 1384, it would seem evident—but appearances are sometimes deceptive—merely carries out the fundamental rule that there is no liability without a fault, either personal or through another, when it adds: "on est responsable non seulement du dommage que l'on cause par son propre fait, mais encore de celui qui est causé par le fait des personnes dont on doit répondre, ou des choses que l'on a sous sa garde."

These provisions, of general application, are followed by some special rules supposed to carry them out. The whole together forms the common law of France with regard to negligence.

As I have already said, for more than three-quarters of a century after the promulgation of the French Code it was constantly held that no action in damages could be maintained without evidence of fault, the onus of proof of which was on the plaintiff. And as late as 1898 we find the following declaration by a French Court: "La responsabilité du patron envers l'ouvrier victime d'un accident au cours du travail qui lui était confié,

était régie exclusivement, avant la loi du 9 Avril 1898 [the French Workmen's Compensation Act], par les Art. 1382 et suiv. C. Cil., qu'en conséquence, l'ouvrier ne pouvait faire peser sur le patron la responsabilité de l'accident dont il avait été victime qu'à la charge d'établir une faute imputable au patron." [1]

It was therefore uniformly held that there was no responsibility without fault, that there was no fault unless there was an illicit act, and consequently that he who made use of his right incurred no liability, however great the damage suffered thereby might be.

This was merely giving effect to the old Roman rule "*nullus videtur dolo facere qui suo jure utitur*" which the old French jurisprudence expressed by the maxim "Icelui n'attente pas qui n'use que de son droit." [2]

No doubt this rule was found to be harsh in many cases. An unsuccessful litigant is rarely consoled when told that the law is a hard one but that it is nevertheless the law, *dura lex sed lex*. And when the injury thus done is not limited to an isolated litigant but is suffered by a large and influential class, the question arises whether the law is really as it has been construed, and if there be no doubt that the law has been correctly stated, whether it should not be changed.

So the chief sufferers by accidents being the working classes, and statistics showing that at least one-half of the accidents are the result of unascertained or unascertainable causes, in which case no clear fault can be demonstrated, it followed that in at least one case out of two the workman was without remedy.

The obvious result of such a state of things was to start an agitation against the law, or to say the least against its strict application. This agitation had a double effect. Demand was made that the law which worked so harshly should be changed. And, at the same time, those to whom was entrusted the study or the application of the law were led to inquire whether the legal propositions which had been universally recognised were really in conformity with the spirit or even the letter of the law.

It is this latter inquiry that to my mind has had the most pregnant results, and has produced a legal evolution that could almost be called a legal revolution.

I have given the text of the first paragraph of Art. 1384 of the French Code, which I may once more repeat as the new construction given to this provision has radically changed the jurisprudence of the French Courts: "On est responsable non seulement du dommage que l'on cause par son propre fait, mais encore de celui qui est causé par le fait des personnes dont on doit répondre, ou des choses que l'on a sous sa garde."

Let me append, and use for the purposes of this discussion, the English version of the corresponding paragraph of Art. 1054 of the Civil Code of the Province of Quebec which, more than Art. 1384 of the Code Napoléon,

[1] Sirey, 1899, 2, 197.

[2] Art. 107 of the Coutume de Brétagne.

lends itself to the new construction: "He (that is to say every person capable of discerning right from wrong)[1] is responsible not only for the damage caused by his own fault, but also by the fault of persons under his control and by things which he has under his care."

Therefore the law seems to render every person capable of discerning right from wrong responsible for the damage caused:—

1st. By his own fault;

2nd. By the fault of persons under his control;

3rd. By things which he has under his care.

Apparently the latter words had been overlooked by the French Commentators, although Laurent, in his monumental work, vol. xx. No. 639, had expressed the view that they might give rise to a presumption of fault. But in 1897, two brilliant jurists, MM. Raymond Saleilles and Louis Josserand, in two monographs published almost simultaneously,[1] claimed that under Art. 1384 of the Civil Code all persons having the care of things are liable for the damage caused by such things, this liability being derived from the law alone, irrespective of any idea of fault.

I am not now concerned with the question whether this new construction put on an old law was or was not warranted by its terms. It would even seem idle now to say that it was probably a forced construction, that according to the intention of the authors of the law the idea which dominates the whole subject is the idea of fault, and that the provision making the person having the care of an inanimate thing (if truly one can have the *care* of an *inanimate* thing) responsible for the damage thereby caused, should be restricted to the special cases mentioned in the following articles, damage caused by an animal, and damage resulting from the fall of a building. All discussion of the merits of the abstract question seems to me to be now useless, inasmuch as the system advocated by MM. Saleilles and Josserand has received the judicial sanction of the highest Courts of France.

A few examples taken from recent decisions will, I think, prove interesting.

In a case reported by Sirey, 1906, part ii. p. 46, some children were killed by the explosion of a threshing machine worked by steam. There were certainly circumstances connected with the accident sufficient to show negligence, but the Court of Appeals of Chambéry based its decision chiefly on the abstract principle that responsibility for the damage caused by a thing "n'est pas subordonnée à l'idée subjective de faute, comme dans les Articles 1382 et 1383, mais bien à l'idée objective de dommage."

The next case to which I will refer is a very interesting one. A balloon was passing over Paris when a sudden storm made it descend in spite of the efforts of its pilot, who nevertheless succeeded in keeping it in the air with the hope of landing in the Bois de Vincennes near by. While the

[1] Raymond Saleilles, *Les accidents du travail et la responsabilité civile*, Paris, 1897; Louis Josserand, *De la responsabilité du fait des choses inanimees*, Paris, 1897.

balloon was thus passing over the houses, some people got hold of the guide rope, and notwithstanding the objections of the pilot, forced him to land in a narrow street. The pilot immediately cried out to the people in the houses to close their windows and to cease smoking. It appears, however, that some persons cut with knives or other instruments the covering of the balloon, so that the houses became filled with gas and an explosion soon occurred, killing one man and wounding several others. It was held by the Court at Paris that the balloonist was liable for the accident, but the damages were reduced on account of the circumstances of the case (Dalloz, 1907, part ii. p. 17). The rule, conceived to be stated by Art. 1384, was too strong to be overcome by the defendant.

The third case, a decision of the Court of Appeals at Amiens of January 24, 1907, was an action in damages by the representatives of a man killed while operating a threshing machine worked by horses. A wheel had broken and a flying piece had fractured the skull of the victim. It was held that under Art. 1384 there was a presumption of fault which could only be rebutted by showing that the accident was the result of *force majeure* or of the fault of the victim. The Court refused to allow evidence of facts which would have shown that the owner of the machine was without negligence (Sirey, 1908, part ii. p. 59).

The fourth case went before the Cour de Cassation, whose decision was rendered on March 25, 1908. Fire had been discovered in a threshing machine operated by steam, and had been seen to fall to the ground. A few moments after, some hay was destroyed. The Court decided, from the sole fact of the fire having originated in the threshing machine, that a presumption of negligence arose which the defendant could only rebut by showing that the machine was not under his care or the care of his employees at the time of the fire, or that the fire was the result of a *cas fortuit* or of a *force majeure* or any other exterior cause (Sirey, 1910, part i. p. 17).

It must be said that, at the present moment, the precise extent of the new doctrine is not absolutely ascertained. In its mildest form it admits of a presumption of fault, dispensing the plaintiff from proving anything save the accident and the damage suffered by him, which presumption, however, can be rebutted by the defendant by showing the absence of fault. I must, however, add that this view (which apparently was taken by certain judges of the Supreme Court of Canada in the case of *The Shawinigan Carbide Co.* v. *Doucet*, 42 Can. S.C.R. 281), is not the prevailing view in France. As far as an outsider can judge, it is now held that the defendant in a damage action cannot rebut the legal presumption of fault by proving that he was himself free from all negligence, but he must show that the accident was caused by a *cas fortuit* or a *force majeure*, and by some decisions he is left only the slender chance of escaping from a condemnation by proving that the damage was caused by *vis major*, that is to

say, by an act which the English version of our code defines as irresistible force, and which is called in English law an act of God.

And some French jurists go even further, and say that now that the principle of personal responsibility for all prejudicial acts is recognised, the Courts can discard, as a useless crutch, the rule of Art. 1384, that one is responsible for the damage caused by things which he has under his care. And in an article by M. Georges Ripert (in *La Revue Critique de Législation et de Jurisprudence*, 1907, p. 214) we find it laid down, as the natural outcome of the legal evolution I have endeavoured to trace, that "la responsabilitê du fait des choses ne sera que le résultat d'un principe plus large, la responsabilité du fait personnel. On sera responsable des choses qu'on a créées, ou qu'on s'est appropriées, ou qu'on a amenagées, sauf à tenir compte du rôle joué par la victime et qui peut être plus ou moins considérable, suivant l'inertie de la chose. On ne peut donc pas parler exclusivement de garde, de surveillance, de profit, de propriété. Il faut toujours retrouver le fait personnel, remonter à l'activité, source première du risque. C'est avec raison que l'on a critiqué un principe qui ferait peser sur la propriété des choses une présomption de responsabilité. Il n'y a pas de responsabilité du fait des choses. Il y a une responsabilité personnelle qui est augmentée parce que l'appropriation et l'aménagement des choses extérieures augmentent notre puissance, notre activité."

The last system is sometimes called the system *du risque créé*, because, according to its advocates, the mere creation of a risk engenders responsibility. They argue thus: "Celui qui, pour son agrément ou pour son profit, introduit dans la société une chose dangereuse, fait courir à ses semblables un certain risque. Ainsi une machine à vapeur éclatera peut-être et blessera ou tuera quelqu'un sans qu'aucune faute ni même aucune imprudence puisse être reprochée au propriétaire de la machine ou à celui qui en a eu la garde, la cause de l'accident demeurant toujours ignorée. N'est-il pas juste que ce risque soit à la charge de celui qui l'a fait naître, c'est-à-dire de celui qui en a la garde, conformément à la règle : *ubi emolumentum ibi onus*?"[1] And we are told that this system is gaining ground every day.

Of course, where a dangerous work is being carried on, or where a person accumulates on his own property elements or forces that will prove dangerous if they are allowed to escape, it may be possible to predicate liability as a consequence of the creation of risk. And I think that I shall be able to show that there is authority, even in English law, for this statement. The difficult point will always be the question of fact, that is to say whether the work or machine is a dangerous one, and opinions may differ as to a steam boiler coming within this category. However, it is not my purpose to criticise, but rather to ascertain what doctrines are now held in France and applied by the Courts, and the system of the *risque créé*,

[1] MM. Baudry-Lacantinerie et Barde, *Obligations*, 3rd ed., vol. iv. p. 692.

especially as defined by M. Ripert, seems to me the very last stage of the evolution or revolution which I have endeavoured to describe.

There is another question which I should perhaps mention, and which has been raised in these days of extraordinary activity which the modern school of jurisprudence in France is now showing. Can a person, while exercising his right, incur responsibility? There is much difference of opinion on this point, but there is certainly some authority for an affirmative answer. Thus the building of a false chimney on a roof to take away the light from a skylight of a near-by house, the erection of a high screen to satisfy the builder's spite against his neighbour, have been enjoined against by the Courts. I can, however, do no more than mention this question, which of course cannot be overlooked when discussing the modern ideas of liability, but which I could not properly discuss within the limits assigned to this paper.

But I think enough has been said to show that, in France at least, new principles of responsibility are enunciated and that there is a serious effort to cope with the changed conditions of modern life.

So far as liability for accident is concerned, there has certainly been an advance, and if the future victim of any accident could choose the place where the mishap is to occur, he would be wise to locate it in France rather than in England. In the latter country, before 1880, two formidable obstacles blocked his way: the defence of common employment, applicable, of course, only to employees, and the defence of contributory negligence which could be set up against any one.

While I naturally feel very diffident in expressing an opinion on this subject, I will nevertheless make bold to say that, before the Employers' Liability Act, 1880, the doctrine of common employment stood on no better foundation—but I confess that it was a very solid one—than the rule *stare decisis*. In fact, I do not know that a more remarkable example of judge-made law can be found in the whole domain of jurisprudence. As a defence it was, I believe, first enunciated in the case of *Priestley* v. *Fowler*, decided in 1837 by the Court of Exchequer,[1] and it ceased to be a debateable question when it was adopted by the House of Lords in the cases of *Bartonshill Coal Co.* v. *Reid* (3 Macq. H.L. Cas. 266, 1858) and *Wilson* v. *Merry* (L.R., 1 App. Cas. 326). I think that no one now will contend that the reasons given by the Courts are in any way satisfactory and convincing. It was said that the employee, knowing that he was to be associated with other workmen, tacitly assumed the risk of injury due to the negligence of his co-workers; that had he not been willing to take these chances of danger, he should have refused to do the work entrusted to him; and that the employer, not being usually present in person, had no means of preventing the negligent acts or omissions of his servants. But as Judge Ruegg (*Employers' Liability and Workmen's Compensation*, 7th ed. p. 11),

[1] 3 M. & W. 1.

says: "It is not difficult to discover the unsoundness of such a system of reasoning. The workman makes no contract to take consequences of the negligence of his fellow workmen; he would be generally very unwilling to do so. The only ground for implying such assent is that he has entered into association with others upon work in the course of which he knows there is risk of injury arising from the negligence of those with whom he thus places himself in contact. If, from this knowledge of risk, a contract to exclude the principle of *respondeat superior* is to be implied, then it should be implied in the case of passengers upon railways and other public conveyances, and, indeed, in the case of every one who voluntarily subjects himself to the ordinary dangers of street traffic."

Of course, from the moment that the principle was admitted by the House of Lords, it became part of the law of England, and probably, of the law of all countries owing allegiance to Great Britain. It was even adopted by countries like the United States, who, although governed by the common law of England, were certainly not bound by decisions rendered three-quarters of a century after their separation from the British Crown. And the fellow-servant principle having been recognised, it was pushed to extremes which, we can imagine, would have scarcely commended themselves to its originators, so much so that a railway employee might have no recourse if injured through the negligence of another employee working miles and miles away, and whom, of course, he had never seen.

It is scarcely necessary to add that no such doctrine as the fellow-servant doctrine was ever admitted in the civil law countries and especially in France. There the rule expressed in England by the maxim *respondeat superior* was applied whether the victim of a servant's negligence were a workman or a stranger. And doubts have even been expressed—although I think the contrary view is supported by authority—whether an employer could, by express contract, exclude liability for injuries caused by the negligence of his servants. At all events, no such tacit contract can be presumed, and, as we have seen, the tendency of the new school of jurisprudence is to relieve the plaintiff from the obligation of proving any negligence at all.

Another obstacle in the way of an English plaintiff in an action *quasi ex delicto* is the defence of contributory negligence. Of course this term implies that the defendant has been guilty of some negligence, but that the plaintiff has also been negligent, and that the injury is the direct result of their combined fault. In such case, in France, and I think in countries which follow the civil law, each party suffers in proportion to his fault. In other words the damages are divided, and if the plaintiff has been equally negligent with the defendant, his compensation is cut down by half. This system, at least to a civilian, certainly seems more reasonable than the prevailing doctrine in common law countries.

On the other hand the rule *res ipsa loquitur*, as applied in England, bears some resemblance, though very distant, to the French system of presuming

fault where damage is caused by an inanimate object. Of course, this rule only applies in England when the accident is of such a character that it is reasonable to presume that it was caused by the negligence of the defendant. In France, the new doctrine is universal in its application; *res ipsa semper loquitur.*

And, while I am mentioning this rule, I am reminded of a principle which is recognised in England, and which suggests to my mind a kind of distant relationship with the theory of abuse of rights. I refer to the dictum of Blackburn J. in *Rylands* v. *Fletcher*, which was approved by the House of Lords (L.R. 3 H.L. 330):

> We think that the true rule of law is, that the person who, for his own purposes, brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape. He can excuse himself by showing that the escape was owing to the plaintiff's default; or, perhaps, that the escape was the consequence of *vis major*, or the act of God; but as nothing of this sort exists here, it is unnecessary to inquire what excuse would be sufficient. The general rule, as above stated, seems on principle just. The person whose grass or corn is trodden down by the escaping cattle of his neighbour, or whose mine is flooded by the water from his neighbour's reservoir, or whose cellar is invaded by the filth of his neighbour's privy, or whose habitation is made unhealthy by the fumes and noisome vapours of his neighbour's alkali works, is damnified without any fault of his own; and it seems but reasonable and just that the neighbour who has brought something on his own property (which was not naturally there), harmless to others so long as it is confined to his own property, but which he knows will be mischievous if it gets on his neighbour's, should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property. But for his act in bringing it there no mischief could have accrued, and it seems but just that he should at his peril keep it there so that no mischief may accrue, or answer for the natural and anticipated consequence. And upon authority this we think is established to be the law, whether the things brought be beasts, or water, or filth, or stenches.

Comparing now the French and English systems, I may, perhaps, be permitted to observe that we have here a curious example of the fallacy of the objection often urged against codification, that it retards the progress of the law by restricting it within too narrow limits. In France, the Code is so construed as to keep pace with the extraordinary development of this industrial age, so much so that as dangers increase, as conditions of liability necessarily widen, the rule drafted more than a century ago is found adequate to meet cases of which the framers of the rule did not even dream. In England, in spite of the greater flexibility possessed by its judicial system, the rules governing liability have become more and more stringent as the necessity of a liberal principle of responsibility became more and more obvious.

In view of the inadequacy of the common law in England to meet

the new conditions of industrial development, an appeal to Parliament was the only remedy. The Factory Acts, in so far as they required the protection and fencing of machinery, were, I believe, first enacted in 1856, and brought about some modification of the doctrine of common employment, for where the master had neglected to provide a safeguard required by statute, and, as a result, an accident occurred by the negligence of a workman, the action of the victim could no longer be met by the plea of common employment.[1]

This, of course, was some palliation, but in the vast majority of cases the fellow-servant rule still held sway, and its extensive application by the Courts created wide-spread dissatisfaction. The usual course was followed, and a parliamentary committee was appointed with instructions to inquire into the whole matter. The result of its report was the passing by Parliament of the Employers' Liability Act, 1880, which practically, if not absolutely, did away with the plea of common employment, placing the servant, when suing for injuries, in as advantageous a position as a stranger. The fellow-servant doctrine had been applied during more than forty years, and I think it left no mourners when it finally disappeared. Naturally the other parts of the Empire, which had followed England's lead in enforcing the rule, were not slow to follow its example in repealing it. In the United States, however, I believe the plea of common employment is still available to the master.

The Employers' Liability Act, therefore, gave the same remedy to workmen as to the rest of the public. One of the obstacles with which they had been forced to contend was removed, but in all other respects they were placed in the same position as any plaintiff in a damage action, and obliged to prove the cause of the accident, its delictual or quasi-delictual character and its prejudicial effect. Their claim could still be defeated if it were shown that they had been guilty of contributory negligence.

It was only in the latter respect that the law of torts in England, after 1880, was less favourable than the civil law system as it was then applied. Under both systems fault had to be demonstrated by the plaintiff, and this was no easy task. For statistics show that nearly one-half of the total number of industrial accidents result from dangers inherent to the work, and consequently by no fault of the employer. In many other instances the minutest inquiry has failed to reveal the cause of the mishap. Therefore, roughly speaking, in fifty cases out of one hundred, leaving entirely out of the question the cases of contributory negligence, the plaintiff's action was doomed to failure.

I am not discussing here whether it is or is not fair that the workman should assume the risk of his employment as the soldier takes the chances of death or of injury in battle. There is perhaps a certain parity between the two cases, especially with regard to the often inadequate remuneration

[1] *Groves* v. *Lord Wimborne* (1898), 2 Q. B. 402.

which is paid for the risk undergone, if not with respect to the motives which animate the soldier of industry and the soldier of war. What can be granted, I think, is that it is in the public interest that those who suffer injury, and the needy dependents of those who suffer death, should not be thrown upon the charity of their neighbours or of the public. On the other hand, the principle that the industry which profits by the labour of the employee should assume in some degree, and probably jointly with the workman, the risk of injury to life and limb, as undoubtedly it assumes the chances of breakage in the machinery, has, it is asserted, much to recommend it from the standpoint of substantial justice. That these considerations have some weight is clearly shown by their general application in the domains of legislation.

What is absolutely certain is that the principle of professional risk became a part of the law of nearly all civilised countries, about the beginning of this century. As defined by the present Prime Minister of Great Britain, it suggests the much-discussed decision of the House of Lords in this case of *Rylands* v. *Fletcher*, mentioned above, for Mr. Asquith says: "Where a person, on his own responsibility and for his own profit, sets in motion agencies which create risk for others, he ought to be civilly responsible for the consequences of what he does."

This principle was probably first recognised in Germany, whose example was followed by England in 1897, by France in the following year, and by the greater part of the British Empire and the Continent of Europe.

The new Workmen's Compensation Act, 1906, in England, is probably the widest, or at least one of the widest, measures providing for compulsory compensation of workmen that is now on the statute-books of any nation. In some respects it certainly goes much farther than the French law or its almost exact copy, the Workmen's Compensation Act, 1909, of the Province of Quebec, the most recent, I think, of the laws founded on the doctrine of professional risk.

A very shrewd observer (M. Sachet) remarks that the compensation laws of different nations reflect the national characteristics of the people by whom they have been enacted. Everything, he says, is most minutely regulated in what he calls the German group, that is to say, Germany, Austria, and Norway; the compensation is provided for by means of insurance, and the cost of this insurance is borne in Germany by the employers and in Austria by both workmen and their masters.

Great Britain, and I may say her Colonies, on the contrary, leave everything to the initiative of the workmen on the one hand, and of the employers of labour on the other. A scale of compensation, in case of accident, is compulsory, but no special guarantees, such as insurance or funds deposited with the Government, are provided. The workman has to consider whether or not his employer is financially in a position to pay him the compensation which, under the law, he is entitled to claim.

Finally the French group (comprising France, Italy, Belgium, and generally those countries governed by the civil law, and I include therein the Province of Quebec in Canada) has a compulsory scale of compensation, and also a guarantee fund, created, under the control of the Government, by all the industries protected by the law. This is the French system, and somewhat different schemes of guarantees exist in the other members of this group, there being in the Province of Quebec no guarantee fund, but an option allowed the workman to require the purchase of an annuity from an insurance company authorised by the Government.

I do not think that I should go into any further details in comparing these different laws. They are all founded upon the same basic principle, that of professional risk, and each country has solved the problem according to its own views of its obligations towards its citizens. They indicate unquestionably an advance towards the recognition, generally, of a wider principle of civil responsibility.

It goes without saying that the new system has met with much criticism. Thus Mr. Dicey, in his able work on *Law and Opinion in England*, p. 282, says :

> This legislation bears all the marked characteristics of collectivism. Workmen are protected against the risks of their employment, not by their own care or foresight or by contracts made with their employers, but by a system of insurance imposed by law upon employers of labour. The contractual capacity both of workmen and of masters is cut down. Encouragement is given to collective bargaining. The law, lastly, secures for one class of the community an advantage, as regards insurance against accidents, which other classes can only obtain at their own expense, and, though it is true that the contract of employment is still entered into directly between masters and workmen, yet in the background stands the State, determining in one most important respect the terms of the labour contract. The rights of workmen in regard to compensation for accidents have become a matter not of contract but of status.

It would be idle to deny that there is some ground for this criticism. Yet, as Mirabeau once said on a momentous occasion: "quand tout le monde a tort, tout le monde a raison." The world may have gone mad, but there is certainly not room in the mad-houses for all the believers in the principle of workmen's compensation. The rather remarkable circumstance connected with the enactment of the French law is that it came at the very moment when the Civil Code, as construed by the Courts, gave ample protection to the working classes. And it may well be doubted whether it has been an advantage to them rather than to their employers, on account of the moderate scale of compensation established. View it as we may, the whole question has been and is of national and international import. The time-honoured principles of the law of torts have been cast aside, a wider rule of responsibility has been framed, and no man can now say what will be the ultimate effects of the new doctrine.

THE GREAT JURISTS OF THE WORLD.

XIII.—LORD STOWELL.

[*Contributed by* NORMAN BENTWICH, ESQ.]

IN the annals of English law there is no other instance of two brothers attaining such a high place as did William Scott and John Scott, who came to be known as Lord Stowell and Lord Eldon. Their excellences were different: the elder was pre-eminent in counsel, the younger in advocacy; the one was supreme as jurist, the other as statesman. Either of them occupied a most distinguished position on the Bench, the one as head of the Chancery Courts, the other as judge of the Court where the Civil Law and Law of Nations was administered; and if Lord Eldon figured more prominently in the life of his own time, his brother left a greater name in the record of jurisprudence. Before his day England had not produced any supreme jurist who by his writings marked a new development of the Law of Nations, unless we place in that class Richard Zouche, who, however, was "more of a systematiser of doctrines than an innovator"; and it was fitting that the great contribution to International Law in a country which has always excelled in practice rather than in theory should be made by a practical and not by a theoretical exponent. Lord Stowell made the law of prize in administering it, as Mansfield and Holt had made the law merchant on the Bench. He did, in fact, for the law of commerce in war what they had done for it in peace—established its rules on a clear and broad basis. But while their work had validity only for the people of their country, much of his obtained the respect of the community of nations. The judgments that he gave were the "living voice" of the *jus gentium*.

William Scott and John Scott were the sons of a Newcastle shipper. William, who was six years the elder, was born in 1745, and by a lucky accident his mother had removed shortly before his birth to a house on the Durham side of the Tyne, in order to escape the turmoil caused by the invasion of the Young Pretender. The accident was lucky in that it enabled William Scott, when he had passed through the Grammar School at Newcastle, to be elected in 1761 to a Durham Scholarship at Corpus Christi College, Oxford. Three years later, profiting further by the lucky accident of his birthplace, he was elected to a Durham fellowship at University

College. Though he had entered as a student at the Middle Temple in 1762, and was already bent on a career at the Bar, his own caution and his father's wish led him to remain at Oxford as tutor of the college. He lectured in ancient history, and in his academic period he acquired a large knowledge of the Roman jurisprudence and of the whole classical culture, to which he owed the grasp of the Civil Law and the dignity and lucidity of expression which marked him as a judge. In 1774 he was appointed Camden Professor of Ancient History; and in that office he delivered courses of lectures, of which one of his biographers says that "the fame of them rendered his classic youth the rival of his judicial age." Gibbon's remark that he was "assured that were they given to the public they would form a most valuable treatise" is less eloquent but more convincing. Throughout his life Stowell retained a close association with literary pursuits and literary society; he was an intimate friend of Dr. Johnson, and was elected a member of the famous literary Club of which the doctor was dictator, and he lived to be its doyen. He did not write a book in the ordinary sense of the term, but the stamp of literature and liberal culture is upon his judgments. The turning-point of his life was the death in 1776 of his father, who left a fortune of not less than £20,000 and made his eldest son residuary legatee. Cautious as he was about risking a loss of income, his circumstances were now such that he could with an easy mind forgo some of his offices at the University, and turn to that career to which he had looked forward from his youth. He resumed his suspended studies at the Middle Temple, and in 1777 he writes: "I have got a room in the Temple, and keep Term with a view of being called to the Bar as soon as possible, which will be in about two years."

His brother John was already making his way at the Common Law Bar, but William elected to practise in the Ecclesiastical and Admiralty Courts, which were then combined in the precincts of Doctors' Commons. He took the degree of Doctor of Civil Law at Oxford—a necessary qualification—and was admitted into the faculty of advocates of those Courts, and at the same time called to the Bar in 1780, when he was thirty-five years of age.

While the Common Law prevailed almost exclusively in the Court of King's Bench, and in the Courts of Chancery an original system of English equity was being evolved, in the Ecclesiastical and Admiralty Courts, which had jurisdiction over testaments, marriages, and shipping, or as a wag put it, over "bad wills, bad wives, and bad wessels," the Civil Law continued to form the basis of jurisprudence. From the beginning of the sixteenth century the barristers practising before those Courts had formed themselves into a college, of which each member was a Doctor in the Civil Law. The register dates from 1511, and the college's first habitation was in a block of houses in Knightrider Street which belonged to St. Paul's Church. After the fire of London in 1666 which destroyed their property, the doctors

were for a time lodged in Exeter House in the Strand—since put to different uses—but in 1672, by an Order-in-Council, they were authorised to retake possession of their old site, and they erected a new building which henceforth bore the name of Doctors' Commons. This college, which received a charter of incorporation, consisted of a number of fellows all of whom had to be doctors, practising in the Court of the Arches or the Archbishop's Court; and the judges of the tribunals before which they pleaded were regularly chosen from among the members. The number of advocates was narrowly limited and seldom exceeded twenty-five, so that once a man of ability was admitted, he was well-nigh certain to secure a large practice.

William Scott was peculiarly fitted for success in the branch of law to which he attached himself. He brought to it not only a splendid intellect, an unrivalled lucidity of expression, an intimate acquaintance with the Civil Law and a wide knowledge of the history of the ages in which it grew, but also some personal experience of shipping affairs. For a year after his father's death he carried on the shipping business preparatory to winding it up; and a privateering enterprise on which a younger brother embarked led him to direct his attention to the Law of Prize. The only quality he lacked was fluency in public speaking: at first he wrote out his speeches, but as the Ecclesiastical and Admiralty Courts knew no jury and relied more on written than on oral testimony, readiness of speech was less requisite than knowledge of law and clearness of argument. In those respects he was pre-eminent. A year of silence was imposed upon all the newly elected members of the college, during which they were expected to attend the Courts, but as soon as the enforced probation was over, Scott leapt to the front. His brother wrote of him in 1783: "His success has been wonderful, and he has been fortunate beyond example." In that year he obtained a sinecure, being appointed the Registrar of the Court of Faculties, and in 1788 he became at once judge of the Consistory Court of the Bishop of London, Vicar-General of the Archbishop of Canterbury, and Advocate-General—a position which had the same rank at Doctors' Commons as that of the Attorney-General at Westminster. The post was exceptionally lucrative at the time he held it, because of the war which broke out between England and France in 1793. Privateering, as Franklin said, was the passion of England; the spoils were large, and Scott gathered in large fees. It was his duty to appear for the Crown in all cases of disputed prize, and as between 1793 and 1815 the English Admiralty granted 10,000 letters of marque, the number of captures which were brought in for decision was immense. In 1798, having obtained a commanding position as advocate, he was appointed judge of the High Court of Admiralty, while a few months later his brother became Solicitor-General. He had entered the House of Commons in 1790 as member for the borough of Downton, after having been unseated on petition for the same borough six years earlier, and in 1801 he was elected as member for the University of Oxford. He kept his seat

till he was raised to the peerage as Lord Stowell in 1821. But he did not take a prominent part in the political sphere: he spoke but seldom in debate and, strangely enough, without distinction. His whole energy was given to, and his fame was entirely gained in, his judicial work, whereby "he stamped the image of his own mind upon the international jurisprudence of the world." As proof of his industry and of the volume of cases he was called upon to decide in that epoch of incessant war, it may be mentioned that in the year 1806 he gave 2,206 decrees and judgments. In addition to this, he was continually advising the Lords of the Admiralty, and was at the same time presiding over ecclesiastical causes. In 1821 he resigned his Consistory judgeship, but he retained his position as judge of the Admiralty Court till 1827. Then, at the age of eighty-three, but while his vigour was still unimpaired, he vacated that office. He gradually declined and died in 1836, leaving a vast property of nearly a quarter of a million in personalty and considerable real estate. Though a bon vivant, he had been saving to the point of meanness throughout his life, and he loved, as he put it, "the elegant simplicity of the three per cents." "Scott will take any *given* quantity of wine," was remarked of him by a clerical wit who noted that he drank more when dining out than when at home. But his little failings of personal character are blotted out by his immense services to English law, and indeed to the whole science of law, which raised the fame of our international jurisprudence to a height to which it had never risen before.

It was the good fortune of Stowell that all his chief judgments were well reported and have been preserved to illuminate posterity; or, rather, it was the happy fortune of Dr. Christopher Robinson that, on taking his seat in the Admiralty Court in 1798, he determined to add to the collection of reports in the other Courts of Justice a set recording the decisions in Admiralty, which had not hitherto been so served. At the same time it was happy for the judge that he was not fettered in his application of broad principles and the usage of nations by the findings of predecessors in his office. "With the exception of a few notes by Sir J. Simpson and some scattered memoranda . . . and occasional references to tradition, there was no precedent for the guidance of Scott," and, one may add, no obstacle in his path. In the field of Ecclesiastical Law he was not so unhampered: here the Canon Law, text-books, and precedents hedged him about; and his decisions, preserved in the reports of Haggard and Phillimore, do not possess the same permanent value and originality. Nevertheless there are several cases in which his judgment has marked an important step in the development of the law. His place among the world's jurists depends, of course, upon the other part of his work, which is preserved in the volumes of Drs. Christopher Robinson, Dodson, and Edwards. As the Napoleonic struggle brought forth a Pitt to direct our politics, a Nelson to carry our navy to triumph, and a Wellington to lead our army to victory, so too it brought

forth a Scott to erect our Prize Law upon a new and firm foundation, and to establish justice in our hegemony of the sea. The judge fitly realised the unique opportunity which lay before him, and he lavished an infinite care upon the preparation and edition of his judgments. By their clear adherence to the principles of justice, strict, perhaps, but seldom strained, as much as by their "inimitable felicity of language," they have commanded since the death of their author the assent not only of the English but also of the American Courts, and, more than that, many of the rules which he laid down in adjudicating upon the cases before him have passed into the law of nations. Coleridge in his *Table-Talk* recommended to all statesmen with the perusal of Grotius, Bynkershoek, Puffendorff, Wolf and Vattel the reports of Dr. Robinson; and the verdict of later generations has confirmed for Lord Stowell the place which the contemporary poet and philosopher assigned to him, as the finest exponent in practice of the law regulating the rights of belligerents and neutrals in war upon the high seas. Amid all the violence and unwarrantable pretensions of the time, advanced by his own country as well as by Napoleon, he held aloft the standard of fairness towards neutrals, enforcing the established law with exactitude and severity, but cutting at the roots of innovation; never countenancing sham evasions of the law, but never, on the other hand, countenancing oppressive fictions. In the stress of war his judgments were impugned by some American judges, but his vindication came upon maturer consideration: as one of them wrote to him later: "On a calm review of your decisions after a lapse of years, I am bound to confess my entire conviction both of their accuracy and equity."

The distinguishing characteristic of Lord Stowell's judgments is his unerring faculty for seizing on the true bearing of every problem presented to him, and his equally unerring powers of applying broad propositions of law to every combination of circumstances. Perhaps it is due to his early career that he brought to the Bench a philosophic grasp such as few English judges have exhibited. Certain it is that he scorned all chicanery and fiction, and that the distinctions which he drew between different cases of capture and prize are always based upon clear principles.

To deal, however, first with the minor part of his work which affected only English jurisprudence. Several of his decisions when sitting in the Episcopal Courts have become leading cases. What characterises them all is the thoroughness and symmetry of their form. First he lays down the broad principles to be applied in the class of case before him, with apt reference to the Civil or Canon Law applicable: then with mastery of learning he deals with the text-writers or judicial precedents, and distinguishes or adopts their remarks: and finally he dissects with singular acumen and lucidity the facts and the evidence in the case before him and applies the law which he has already ennnciated. Typical is his judgment in the case of *Dalrymple* v. *Dalrymple*, reported in Haggard (vol. ii. p. 54). In that case he was called upon to decide whether a marriage entered upon by civil contract without a

religious celebration according to the law of Scotland was valid, one of the parties being an English officer on service, quartered in Scotland. Of the objection raised on this score he makes short work:

"Being entertained in an English court, the case must be adjudicated according to the principles of English law applicable to such a case. But the only principle applicable to such a case by the law of England is that the validity of Miss G.'s marriage rights must be tried by reference to the law of the country where, if they emit at all, they had their origin. Having furnished this principle, the law of England withdraws altogether, and leaves the legal question to the exclusive judgment of the law of Scotland." He passes on to an elaborate analysis of the general Roman and Canon Law of marriage, and then to a consideration of the marriage law of Scotland, in order to see in what instances it has "resiled" from the general law. He reviews first the opinions of all the authoritative Scottish jurists, and next the judicial decisions of the Scottish Courts, and finally enunciates the rule that by the law of Scotland "the *marriage contract de præsenti* does not require consummation in order to become very matrimony; that it does *ipso facto et ipso jure* constitute the relation of man and wife."

Similar in its general framework is the judgment in *Lindo* v. *Belisario* (1 Haggard 216), where he has to determine the validity not of a Scottish but of a Jewish marriage—a new point in the English Courts. Here, in the same thorough fashion, he examines and weighs the opinions of the various Rabbinic authorities upon the question whether a betrothal carried out with certain ceremonies ranks as a binding marriage contract, and in the end, feeling himself, as he says, to be on novel ground "on which doubts ought to be entertained and questions sifted with great caution," he frames a few particular questions which he addresses to the Jewish authorities; and upon the answers to these questions he later gives his judgment. "If," he remarks, "I were to determine the question of marriage on principles different from the established authorities amongst the Jews as now certified, I should be unhinging every institution, and taking upon myself the responsibility as Ecclesiastical Judge, in opposition to those who possess a more natural right to determine on questions of this kind."

The principle here laid down that domicile does not involve an unlimited subjection to the ordinary laws of the country, he affirms again in one of the last decisions he gave as judge of the Consistory Court—*Reading* v. *Smith*, 1821 (2 Haggard 371), when the question was as to the validity of a marriage celebrated in South Africa between two British subjects which would have been void by the local law. He held that the marriage was good, because of the circumstances that the husband was an officer in the British forces occupying the country, the parties had been married by the English chaplain, and the marriage had stood for twenty-five years. He was free to apply equitable principles, because "while the English decisions have established the rule that a foreign marriage, valid according to the

law of the place where celebrated, is good everywhere else, they have not *e converso* established that marriages of British subjects, not good according to the general law of the place where celebrated, are universally to be regarded as invalid in England."

Though willing to apply equitable justice wherever he felt it open to him, Sir William Scott never allowed himself to be moved from the strict administration of the established law by vague considerations of humanity. At the outset of his judgment in *Evans* v. *Evans* (1 Hagg. 35), where he defined the conditions of "legal cruelty" as a ground of divorce in a way which has never been excelled, he states his maxim concisely: "Humanity is the second virtue of the Courts, but undoubtedly the first is justice." It was the same outlook which led him to hold in the trial of *The Slave Grace*—which came to him on appeal from the Vice-Admiralty Court of Antigua—that the temporary residence in England of a negro slave without manumission suspends, but does not extinguish, the status of slavery of a person who after such residence voluntarily returns to a country where slavery is legal. The decision aroused great opposition at the time and is of only academic interest to-day; but though the last of Stowell's reported judgments, it is impregnated with the same mastery of principle and unswerving respect for the law as his Admiralty decisions in prize law. It is significant that in a letter to Mr. Justice Story he expressed his personal disgust at the continuance of slavery in the West Indies, and that the American jurist in reply declared his complete agreement with his reasoning in this judgment.

As he did not allow personal feeling to influence his judgment in times of peace, so in times of war he was not swayed by national antipathies in considerations of national interest. Foreign critics have indeed accused him of undue severity; but the complaint is rather that the law which he administered was oppressive upon neutrals than that he administered it with partiality or national bias in favour of captors. And in defence of his attitude towards neutrals, it should be pointed out that he was judge of the Admiralty Court when England was fighting for her national existence, and when Napoleon sought to make neutrals his instruments in the war against English commerce. The supreme justification of Stowell's decrees is that the United States, whose merchants had been hardest hit by them, came afterwards to recognise their equity and to follow them when they became belligerent.

To turn now to these decisions, it is unnecessary to summarise the Prize Law of England as it was established by Stowell. All one can do is to notice a few points which illustrate his general outlook, and some of the rules which he laid down. His judgment delivered during the first year of his office (1798), in the case of *The Maria* (1 C. Rob. 350), one of a fleet of Swedish merchantmen which was sailing under convoy of a ship of war, and in pursuance of the principles of the Armed Neutrality resisted visitation and search by a British cruiser, has become a classic of International Law. He

enunciates in two sentences the proper character of the Prize Court as a tribunal where the law of nations is administered. "The seat of judicial authority is locally here in the belligerent country, according to the known law and practice of nations, but the law itself has no locality. It is the duty of the judge sitting in an Admiralty Court not to deliver occasional and shifting opinions to serve present purposes and particular national interest, but to administer with indifference that justice which the law of nations holds out without distinction to independent States, some happening to be neutral and some belligerent." And upon the merits of the case before him he insists that the usages and practice of nations have recognised the right of the belligerent to protect himself through search of suspected ships against assistance being given to his enemy by neutrals, and he sweeps away the loose arguments urged in support of the rules of the Armed Neutrality that convoyed ships should be free from search. "Upon such unauthorised speculations it is not necessary for me to descant; the law and practice of nations (I include particularly the practice of Sweden when it happens to be belligerent) give them no sort of countenance, and until that law and practice are newly modelled in such a way as may surrender the honour and ancient rights of some nations to the present conveniences of other nations (which nations may perhaps remember to forget them when they happen to be themselves belligerent), no reverence is due to them: they are the elements of that system which, if it is consistent, has for its real purpose an entire abolition of capture in war, that is, in other words, to change the nature of hostility as it has ever existed among mankind, and to introduce a state of things not yet seen in the world—that of a military war and a commercial peace." The Declaration of London of 1908 proposes indeed the renunciation of the right of search of convoyed neutral vessels, so that the exact point decided in the case may be obsolete; but the principles which are laid down in this judgment as to the bindingness of international practice, till by the consent of nations it is changed, remain of abiding validity.

Lord Stowell conceived the position of a Prize Court in its full dignity and responsibility as an international Court, administering not the national judge's theories, but the acknowledged practice of nations, and he defined this conception most eloquently in a case where he had to determine whether a belligerent could set up a Prize Court in neutral territory (*The Flad Oyen*, 1 C. Rob. 135). A French privateer had carried an English prize vessel into Bergen, and there procured its condemnation by the French Consul. In repudiating the condemnation he declares: "It is my duty not to admit that because one nation has thought proper to depart from the common usage of the world and to treat the notice of mankind in a new and unprecedented manner, that I am on that account under the necessity of acknowledging the efficacy of such a novel institution, merely because general theory might give it a degree of countenance independent of all practice

from the earliest history of mankind. The institution must conform to the text-law and likewise to the constant usage upon the matter." He neither introduced new doctrines himself, nor could he respect their introduction by foreign powers. His function, as he understood it, was where a clear practice did not exist, to define exactly, by application to particular and varying cases, the general principles that were to be found in the works of the great publicists; where it did exist, to follow it and if necessary amplify its scope.

Among the doctrines hitherto attended with doubt, which Lord Stowell placed upon a certain foundation, was the illegality of trading with the enemy during war. In the case of *The Hoop* (1799, 1 C. Rob. 196) he reviewed the large number of cases decided by the English Lords of Appeal during the eighteenth century, and, bringing to their support the statements of Bynkershoek, he enunciated the clear principle that "all trading with the public enemy unless with the permission of the Sovereign is interdicted." The disability of an alien enemy to sue in the Courts is the reason for the prohibition; since "a state in which contracts cannot be enforced cannot be a state of legal commerce." The excellence of this, as of so many of Stowell's judgments, is not that it introduces a new rule, but that it elucidates the existing doctrine and confirms it with reason. His statement of the rule is "What oft was held, but ne'er so well expressed."

The doctrine of "trade domicil in war" is another to which he gave definiteness and stability. In his day the requirements of domicil for the purposes of the personal law had not been thoroughly investigated; but sitting as a Prize Court judge he was concerned with a different kind of domicil—viz. the quality of residence in, or association with, a foreign country which was necessary to clothe a man with enemy or neutral character.

The object of the prohibition of trade with the enemy and the confiscation of enemy ships and cargoes being to prevent the increase of wealth which commerce brings, the belligerent attached enemy character to a merchant not according to his nationality but according to his place of residence or his place of business. If a British or an enemy subject, either before or during the war, removed to a neutral country and *bonâ fide* took up his residence there, then his innocent trading did not offend against the belligerent; if, on the other hand, a neutral subject took up his residence or established a business house in England or in an enemy country, his ship or his cargo received the national character of its origin. Under the influence indeed of the ideas of the French Revolution which emphasised the principle of nationality, the French Prize Courts adopted another criterion of enemy character, and made it depend upon the political allegiance of the subject. Thus it was held in the case of *Le Hardy*, 1802, that a neutral merchant domiciled in a belligerent country did not acquire a belligerent character, and his property at sea was neutral property.

The new doctrine, however, found no favour with Stowell. Every person

domiciled in an enemy state, whether a born subject of that state or not, he regarded as an enemy, and he condemned his ship or cargo if captured (cf. *The Indian Chief*, 1801, 3 C. Rob. 12). Conversely, every person domiciled in a neutral country, whether a British or a neutral or an enemy subject, he regarded for purposes of maritime capture as a neutral (cf. *The Danous*, 1802, 4 C. Rob. 255). This was the general rule, but with his strict application of the law in favour of captors Stowell further laid down in *The Jonge Klassine* (1804, 5 C. Rob. 302) that a merchant may have mercantile concerns in two countries, and if he acts as a merchant of both must be liable to be considered as a subject of both. Hence the cargo derived from the business house of a neutral owner in the enemy country might be condemned. On the other hand, he pointed out in *The Herman* (1802, 4 C. Rob. 228) that "when a person has a house of trade in the neutral country, and one in Great Britain secondary to his house in the neutral country, that he may carry on trade with the enemy from his first house cannot be denied, provided it does not originate from his house in London, nor vest an interest in that house." And while the intention of permanent residence in a country was necessary in his day to fix domicil for civil purposes, he held, as the nature of the case required, that a trade domicil for the purpose of establishing enemy or neutral character might be more easily acquired. Any residence or establishment in the country for commercial purposes such as made a person's trade or business contribute to and form part of the resources of such country was sufficient, whether or not there was an intention to make the country a permanent home. The trade domicil, again, might be lost as easily as it was gained. Stowell formulated the two main rules which still govern the subject of commercial domicil in the cases of *The Harmony* (1800, 2 C. Rob. 322) and *The Indian Chief* (1801, 3 C. Rob. 12). In the former he pointed out that "time is the grand ingredient in constituting domicil . . . be the occupation what it may, it cannot happen but with few exceptions that a mere length of time shall not constitute a domicil," while in the latter he declared: "The character that is gained by residence ceases by residence; it is an adventitious character which no longer adheres to him (the merchant) from the moment that he puts himself in motion *bonâ fide* to quit the country *sine animo revertendi*."

Some modern writers have denied that there should be any difference between trade domicil in time of war and personal domicil in time of peace, but the distinction is reasonably based on the different purpose and consequences of the two statutes, and it has been regarded by both English and American Courts for a century; and Stowell's standard of domicil for prize purposes has been throughout adopted.

It would be tedious to mention the decisions in which Lord Stowell defined the English rule as regards contraband, absolute and conditional, and the penalty for its carriage, the conditions of a blockade by notice and

de facto, and the varying penalties for its breach, unneutral service by carriage of despatches or military officers of the enemy, and the legal consequences attaching to it, the effect of recapture of a prize, and of the transfer of a cargo *in transitu* by a belligerent to a neutral owner, and the engagement by a neutral in the colonial and coasting trade of the enemy. Suffice it to say that he settled our Prize Law upon all these points, and, though circumstances have changed, and international agreements have largely cut down the rights of maritime capture, his judgments still remain the surest guide upon Prize Law, and mark out with scarcely an exception the proper limit of interference with neutral trade.

On one point, indeed, modern practice has countenanced an extension of a rule which he formulated, beyond the point to which he applied it. In order to evade the prohibition against carrying merchandise from the French and Dutch Colonies during the Napoleonic wars, the shippers of the United States were in the habit of consigning the goods in the first place to some neutral port in the United States or elsewhere, and then transhipping them on another vessel which brought them to Europe as colourable American merchandise. Lord Stowell, however, crushed this evasion in condemning *The Maria*, No. 3 (5 C. Rob. 365), and *The William*, No. 2 (*ibid.* p. 585). The Court, he insisted, did not regard the fiction but the fact, and if the cargo were in fact destined for the enemy's country, or in fact derived from the enemy's colony, then it was confiscated whether it was nominally consigned to, or had been nominally transhipped from, a neutral port. "The truth may not always be discernible, but when it is discovered, it is according to the truth and not according to the fiction that we are to give to the transaction its character and denomination. If the voyage from the place of lading be not really ended, it matters not by what acts the party may have evinced his desire of making it appear to have ended."

But in the case of ordinary contraband trading he did not apply the so-called doctrine of continuous voyage. A ship, he said, could only be condemned out of her own mouth, and the articles to be confiscable must be taken *in delicto*, in the actual prosecution of the voyage to an enemy's port (*The Imina*, 3 C. Rob. 167). Though there might be the strongest reason to suspect the ultimate hostile destination of her cargo, yet, if her own port of delivery were neutral, the cargo was immune. The growth of railways and the desire of belligerents to compensate themselves for the loss of offensive rights which the Declaration of Paris has entailed, by pressing those that remain, have led to the application of the rule of continuous voyage to any cargo of contraband goods which is ultimately destined for the enemy's forces. Long disputed, the usage has received the sanction of the Declaration of London as regards goods which are absolute contraband, though not as regards those which are only conditional contraband. To another innovation of latter-day belligerents which has not yet received, and

it may be hoped will never receive, international sanction, Lord Stowell lent no countenance, viz. the destruction of neutral prizes before proper condemnation in a Prize Court, without making compensation to the neutral owner, if in the end the guilt of the vessel were not proved. His opinions upon the proper treatment of prizes by the captor are set out in his last recorded prize judgment, *The Felicity* (1819, 2 Dodson 381).

In all cases of capture, he says, it is the captor's first duty to bring in the prize to port for adjudication. "If impossible to bring in, the next duty is to destroy enemy's property. Where doubtful whether enemy's property and impossible to bring in, no such obligation arises, and the safe and proper course is to dismiss. When it is neutral, the act of destruction cannot be justified to the neutral owner by the gravest importance of such an act to the public service of the captor's own state; to the neutral it can only be justified under any such circumstances by a full restitution in value. These are rules so clear in principle and established in practice, that they require neither reasoning nor precedent to illustrate or support them."

It has been said of sermons that, while dealing with eternal subjects, they tend to be the most ephemeral literature; and so it might be said of prize judgments, that though concerned with International Law they tend to be the most national expressions of judicial opinion. But at the beginning of the nineteenth century Stowell in England, and to a smaller degree Marshall in the United States, bringing to their national Prize Courts two of the greatest intellects of the time, realised the ideal character of the jurisdiction entrusted to them, and established an Anglo-Saxon law of prize which may truly be described as "a light to the nations." It is one of the surest testimonies of the stability of Stowell's work that the Declaration of London, which was recently drawn up by representatives of the great Powers to serve as a code of maritime law in war, embodies many of the rules which he formulated when sitting as judge of the British Prize Court. And the International Convention for the establishment of an International Prize Court, which was promoted by the British Government and signed by the delegates of all the Powers at The Hague Peace Conference, 1907, gives reality at last to that ideal of the Prize Court which he upheld, as a tribunal administering the law of nations, by providing for the constitution of an appeal court in matters of prize, which shall be as well in fact as in theory, and both in its membership and the law it applies, international.

NATIONALITY AND NATURALISATION IN LATIN AMERICA FROM THE POINT OF VIEW OF INTERNATIONAL LAW.

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I.—INTRODUCTORY.

International Rights and Duties Springing from Nationality.—The Law of Nations being a law dealing with the relations of States, it follows that individuals as such are not subjects of this law. In practice, however, it is generally on account of the actions of private individuals, either directly or indirectly, that the rules of International Law are put into play—that is to say, that a State issues or receives a complaint because an international injunction has been disregarded by one of its members. This being so, it is eminently important to know how it is that the individual comes to be connected with an international entity so as to cause rights and liabilities to spring up, which the Law of Nations will enforce or sanction. For it is evident that when a wrong has been committed not all the international community has a right to exact the corresponding reparation, but only the particular State or States which are deemed to have been injured. How are we to know, then, what particular State is entitled to claim compensation for the damages, injuries, or maltreatment suffered by an individual on account of the actions of another State or of persons for whom the latter is responsible? The answer to this question is supplied by the law of nationality.

The rights to which a State is entitled in virtue of the doctrine of nationality become apparent when a person leaves the country of which he is reputed to be a member and settles in a foreign country. For every State has the right to protect its citizens abroad—a right which most States exercise vigorously, keeping their diplomatic agents on the alert, jealously regarding any action which may be injurious to their citizens or subjects.

Nor is it of less importance for a State to be able to claim the aid of its members when the occasion arises. For the local law may impose particular liabilities on those persons who are citizens or subjects, many of these duties being incumbent on the members of the State even when they reside in foreign lands. The home Government is even entitled to

demand of such persons to leave the foreign country in which they reside and come home to lend the services which the law imposes upon them.[1] And a State is considered to have no power to detain a foreign subject when the latter has received orders from his country to that effect, except when a right to the contrary is granted by the laws of belligerency.

In dealing with the rights granted by International Law in connection with the law of nationality, the extradition of criminals may also be mentioned, since by the majority of extradition treaties a State has the right to refuse to extradite one of its own subjects.

In the same way it is held that there are just causes for the expulsion of foreigners, and also that there is a right to refuse to admit those who are not members of the community.

On the other hand, one of the most conspicuous duties with which a State is saddled in virtue of the law of nationality is that of receiving on its territory such of its members as are not allowed to enter in or remain on the territory of other States. It is possible, at least theoretically, that certain persons may be expelled or refused admittance by all foreign countries. The States to which such persons belong cannot refuse to receive them.

Lack of Universal Rules in International Law for Determining who are and who are not Subjects.—We have seen that there are rights granted to, and duties imposed on, States on account of their personal element; and that these rights and duties are, therefore, the creation of the Law of Nations. *Prima facie* one would be inclined to expect that the ideal International Law should also determine who are the persons to be considered as members of a given State—that is to say, that it should lay down rules for the guidance of every State when its municipal law is attempting to discriminate between nationals and foreigners.[2] Unfortunately the imperfection of the Law of Nations is such that this is not the only chapter where provisions for the dealings of States is wanted. And it cannot be thought by any one who has considered the rights and liabilities of States springing from the notion of nationality that the want of provisions, so far as they relate to this subject, are devoid of importance. But the inconvenience consequent upon this lack of universal principles will become perfectly obvious when an attempt is made to inquire into the rules that obtain in different countries. It will then be possible to appreciate how difficult and complex are most of the questions arising out of nationality and naturalisation. Considerable friction in the friendly relations of States

[1] The so-called *jus avocandi*.

[2] It is probable that Professor Oppenheim had in mind the *actual* state of International Law in this connection when he said that "it is not for International but for Municipal Law to determine who is and who is not to be considered a subject" (*International Law*, vol. i. p. 348). Should he mean, however, that even from an ideal point of view the province of International Law should not extend to affording guidance to States in determining which persons ought to be considered as subjects or citizens of a given State, we would not be inclined to agree with him.

would be avoided if it were possible to adopt rules applicable to every member of the international community.

International jurists frame rules by inquiring into the treaties and practices of nations. When no rules can be laid down in a particular subject they content themselves sometimes with advocating a particular principle, hoping that the custom of States would tend in that direction, and thus an international consensus would be arrived at. No other course is possible owing to the fundamental principle that the members of the family of nations are sovereign States, and therefore there is no person or body who can enact laws for governing the relations of State to State. International Law is yet in course of development.

In connection with nationality and naturalisation States are left free to determine what persons are to be considered subjects and what persons are foreigners. It may be stated in advance that there is no place in International Law where more conflicting rules would obtain. For in the absence of definite international injunctions States generally follow that rule which most favours their interests. And a plurality of adverse interests will necessarily produce conflicting conduct. It is not intended to suggest that States, whenever possible, disregard the general good. International persons, just like ordinary individuals, would adopt that line of action which apparently entails greater benefits to themselves, overlooking, so far as the circumstances would allow, the contingent harm that may result to others, provided that the hardship thus ensuing is not a considerable one. The tendency to act in this manner seems to be inherent in the actual state of society, notwithstanding that an intention to produce such results is expressly disclaimed.

International Law enjoins that States should frame their conduct in accordance with its rules, but it cannot enforce inaction when no rules exist. The political action of States then comes into play. Professor Westlake speaks of certain classes of cases in which such action on the part of States is justifiable. "One is that in which no rule meeting the circumstances has been sanctioned by the consent of the international society. We do not mean only that there is no recognised rule for guiding action in the circumstances, but also that there is no general opinion condemning action in them; for such an opinion, if it existed, would be equivalent to a rule in favour of the state of things which must continue if action is not taken."[1]

It is hardly necessary to point out that the notion of nationality is one of the cases that the eminent writer had in mind when he laid down the rule contained in the foregoing passage. In saying so we do not mean to suggest that a State is at liberty to issue any rules it likes on this subject, for undoubtedly cases may arise, and in fact exist, which the Law of Nations condemns. The discussion of these would be better in connection with

[1] *International Law*, vol. i. p. 288.

the particular rules with which we shall have to deal in the following pages. Nevertheless it is perfectly clear that the municipal law of States has a wide scope in determining the principles that should govern both nationality and naturalisation.

II.—NATIONALITY OF ORIGIN.

When a person is considered as a member of a given community his nationality may be of origin, or acquired.[1]

The usual manner of dealing with nationality of origin has been to consider the three groups and systems into which nations are supposed to divide. But it is in fact impossible to arrive at the formation of a perfectly logical classification owing to the variety of the provisions and exceptions of the different States. Nevertheless we shall deal summarily with the three systems for the sole purpose of giving a vague idea of the main path followed by the members of the international family.

1st Group.—Children follow the nationality of their parents whatever may be their place of birth (*jus sanguinis*). This system is to be found, *e.g.*, in Austria, Costa Rica, Germany, Hungary, Mexico, Salvador, Switzerland, etc. But the rule is not absolute ; for sometimes it is found in the legislation of those countries which most nearly follow this practice that they claim as nationals the children born or found in the country whose parents or nationality are unknown.[2] Sometimes the children of foreigners are deemed to be nationals if they have not, one year after attaining majority, declared before the competent authority that they choose to follow the nationality of their parents,[3] or if on becoming of age they inscribe themselves in the proper register.[4]

2nd Group.—Nationality is determined by the place of birth, whatever may be the parentage of the person in question (*jus soli*). This system is adopted by the following countries of the New World: Argentina, Bolivia, Brazil, Chile, Colombia, Ecuador, Guatemala, Honduras, Nicaragua, Panama, Paraguay, Peru, Uruguay, and Venezuela. It must be pointed out, however, that although this principle is adopted in its generality by those countries, yet

[1] It must be said here that we are greatly indebted to the masterly study of M. Lehr, *De la Nationalité et des diverses manières dont elle s'acquiert dans les principaux Etats du globe*, as supplying us with a guide to the original text of the diverse laws and constitutions which we have directly consulted. We owe also information in this respect to the kindness of some diplomatic and consular agents. It is hardly necessary to say that such works as Cogordan, *La Nationalité*, and the general treatises on International Law by Bonfils, Hall, Oppenheim, Westlake, etc., have proved of great value to us.

[2] Costa Rica, Law of December 21, 1886, Art. 1 ; Mexico, Law of May 28, 1886, Art. 1.

[3] San Salvador, Law of September 29, 1886, Art. 2 ; Mexico, Law of May 28, 1886, Art. 2 (2).

[4] Cuba, Constitution of February 21, 1901, Art. 5 (2). Cuba claims also as her nationals those persons born in foreign countries of native-born parents who have forfeited the Cuban nationality, provided that on attaining majority they inscribe their names in the proper register. Constitution, Art. 5 (3).

they sometimes follow both the *jus soli* and the *jus sanguinis*, as will subsequently appear.[1]

3rd Group.—There are some countries that follow a mixed rule, paying attention both to the nationality of the parents and to the place of birth.

Jus Sanguinis in Latin America.—It has been pointed out that only Costa Rica, Cuba, Mexico, and San Salvador can be said to follow in Latin America the principle of the *jus sanguinis*. There are other countries, however, which adopt the *jus sanguinis* to the extent of giving their nationality to the children of their citizens, even when born abroad, provided that they come to establish their domicile in the country of their parents. Provisions to this effect are to be found in Bolivia,[2] Brazil,[3] Chile,[4] Colombia,[5] Ecuador,[6] Guatemala,[7] Panama,[8] Paraguay,[9] Uruguay,[10] and Venezuela.[11]

Although Argentina [12] and Nicaragua [13] have adopted also the principle of the *jus soli*, yet the children of their citizens born abroad take the nationality of their parents if they choose, there being no provision as to their domicile.

In Honduras it has been enacted that the nationality of children of Hondurans born in foreign territory is to be determined by treaty; it seems, therefore, that when there is no conventional provision the nationality of such persons, even when domiciled in Honduras, is that of their place of birth, for this Republic follows closely the *jus soli*.[14]

The law of Peru with regard to the children of a Peruvian father or mother born in foreign parts is to the effect that they are Peruvians by birth, if their names shall have been inscribed in the Civic Register during minority by the will of their parents, or by their own wish upon attaining majority, or being emancipated.[15]

Jus Soli in Latin America.—We have seen that there are at least fourteen countries in Latin America which claim as nationals all persons born within their territory, and, under certain conditions, also the children of their citizens

[1] For the special reasons that have led the majority of the Republics of Latin America to follow this practice, see pp. 130 and 132.

[2] Constitution of Bolivia, 1880, Art. 32. [3] Constitution of Brazil, Art. 69.

[4] Constitution of Chile, Art. 6 (2). [5] Constitution of Colombia, 1886, Art. 8.

[6] In Ecuador the law is that children of Ecuadorian father or mother, born abroad, are Ecuadorian if they establish their domicile in the Republic and express their wish to be considered as such. Constitution of 1897, Art. 6 (3).

[7] In Guatemala children of Guatemalans, born abroad, are considered as natives even without the condition of establishing their domicile in Guatemala, when conformably with the laws of the country of their birth, they shall be entitled to choose their nationality and they choose for Guatemala. Constitution, Art. 5 (2).

[8] In Panama there is the further proviso that such persons should express their desire to become citizens of Panama. Constitution, 1904, Art. 6 (2).

[9] Constitution of Paraguay, 1870, Art. 35 (2). [10] Constitution of Uruguay, Art. 8.

[11] In Venezuela they must, in addition, declare before the *Registrador Principal* their desire to be deemed Venezuelan citizens.

[12] Law of October 1, 1869. [13] Constitution of Nicaragua, 1893, Art. 7 (2).

[14] Constitution of Honduras, 1904, Art. 7 (1). [15] Peruvian Constitution, Art. 34 (2).

even when born abroad. But some of these States require that certain conditions should be fulfilled in order to impose their nationality on the children of foreign parentage when born in the country. That is to say, although the *jus soli* is consecrated by those Republics which have been enumerated above, yet there are a few of these States which do not seem anxious to have the allegiance of certain persons, at least from a theoretical point of view, while in fact no advantage whatever would be derived from clothing them with the legal apparatus of nationality.

These disadvantages and inconveniences seem to have been perceived by the legislatures of Colombia, Ecuador, and Honduras, in so far as they relate to the nationality of children of foreign parentage born within the national territory. In these countries there are provisions to the effect that such persons are Colombians, Ecuadorians, or Hondurans (as the case may be) if they reside in the country of their birth. Enactments of this kind cannot fail to avoid vexatious conflicts, for it would be difficult, if not impossible, to assert the national jurisdiction when the person whose nationality is in question has fixed his domicile in the country of his parents.[1]

The Latin American countries have never attempted to impose their nationality on the children of foreigners who reside in their territories as diplomatic agents. In the same way, by virtue of the doctrine of exterritoriality they claim as citizens the children of their own officials even though they may not establish their domicile in the country of their parents. There are provisions in force which confer the rights and liabilities of nationality on the issue of persons who reside abroad in the *service* of their country, and these persons are to be deemed nationals, without the general requisite as to their domicile, even in cases when the local law requires that birth shall have taken place in the national territory.[2]

In those countries where the *jus soli* is the guiding principle in determining nationality it is to be expected that all public vessels, without any kind of distinction, should be held to be part of the national territory. Guatemala,[3] Honduras,[4] Mexico,[5] and San Salvador[6] have expressly incorporated in their legislation provisions to this effect. Public vessels are undoubtedly outside the jurisdiction of the local authorities when they happen to be in a foreign port, and therefore no abuse is committed by treating them as national territory for the purpose of determining the nationality of those persons born on board. On the other hand merchantmen, when lying in foreign ports, are subject to the local law. It would seem unreasonable to consider them as part of the national territory when in a foreign port for the purpose of

[1] Cp. Constitution of Colombia, 1886, Art. 8; Constitution of Ecuador, 1897, Art. 6(2); Constitution of Honduras, 1904, Art. 7 (1).

[2] Bolivian Constitution, 1880, Art. 31 (2); Brazil, Constitution, Art. 69, and Law of Nov. 12, 1902, Art. 1; Chilean Constitution, Art. 6 (2); Mexico, Law of May 28, 1886, Art. 5, etc.

[3] Law of February 21, 1894, Art. 2.

[4] Law of April 10, 1895, Art. 2.

[5] Law of May 28, 1886, Art. 3.

[6] Law of September 29, 1886, Art. 3.

deciding upon the nationality of a person who is born there. There do not appear to have been any cases decided on this question. The problem would be greatly complicated owing to the fact of conflicting principles of nationality and of territorial jurisdiction. As to the latter, however, it must be remembered that most countries of Continental Europe and the New World generally do not apply the local law to foreign merchantmen found in their waters —an exception which must be ascribed to comity when it has not been expressly provided for by treaties. But the question remains as to whether this relation of what is at most an imperfect right can be extended, so as to give to the vessel the character of national territory for the purpose of determining the nationality of those born on board.

So far we have confined our remarks to the case of nationality of origin. In the course of this short inquiry we have seen that a large majority of the Latin American States adopt the *jus soli*, while at the same time they follow the *jus sanguinis* to the extent of claiming the children of native parents born abroad when they fix their domicile in their parents' country.

It would only be natural to expect that these countries would allow a similar rule to apply in case of the children of foreigners born in the national territory—that is to say, they will not claim such persons as their citizens when they have fixed their residence in their father's land. Peaceful intercourse between nations is inconceivable when no reciprocity is permitted. No nations are so ready to claim the legal equality of the members of the international family as the Latin American Republics; hence it is to be hoped that although express legislation confining this principle to the extent to which we have pointed out is scarce,[1] yet no difficulties would be placed in the way of those who, born of foreign parentage, have gone to the country of their parents and wish to retain or be invested with the latter's nationality. We have not been able to discover any cases that have formed the subject of diplomatic discussion, but in view of the considerations which we have ventured to submit, it would seem that the Latin American States would be expected to allow a relaxation of the strict principle of the *jus soli* in this connection.

Illegitimate Children.—In dealing with the case of illegitimate children it should be borne in mind that such persons, according to a rule universally accepted, take the nationality of the mother's country if they are born there, and not that of the father, for in law he is necessarily uncertain. The complexity arises when they are born in a country different from that of their mother. In Latin America Costa Rica[2] and Mexico[3] claim such persons as their citizens absolutely, while Bolivia,[4] Brazil,[5] Colombia,[6]

[1] See p. 131, *ante*.

[2] Law of December 21, 1886, Art. 1 (2). Costa Rica claims also the illegitimate child of a foreign mother acknowledged by a Costa Rica father.

[3] Law of May 28, 1886, Art. 1 (4).

[4] Constitution of 1880, Art. 32 (1).

[5] Constitution of 1891, Art. 69 (2).

[6] Constitution of 1886, Art. 8 (2).

Ecuador,[1] Guatemala,[2] Nicaragua,[3] Paraguay,[4] and Uruguay[5] make them their citizens conditionally on taking up their residence or becoming domiciled in the country.

III.—ACQUIRED NATIONALITY.

Quite apart from birth a person may be invested with the rights and liabilities of nationality by certain acts performed by himself or herself. The sphere within which such acts lie is not without restriction, although it may seem, *prima facie*, from what we have said before, that a State is at liberty, generally speaking, to issue the necessary rules regulating nationality, since International Law does not as yet afford complete guidance on the subject. For the fact is that however vague and indefinite the limitation to the political actions of States might be, yet there is always some kind of sanction that prevents, or at least condemns, reckless and injurious conduct. For a State cannot regard with benevolent eyes, especially in connection with nationality, the action of another State which is calculated, or has a tendency, to deprive the former of a certain number of citizens or subjects, for these constitute what may be called the *personal* element of statehood. The acts of which we are now speaking are those to which the local law attaches the special importance of vesting those persons who perform them with the national character.

(i) **Marriage.**—Marriage is generally held to invest the wife with the nationality of the husband. The rule is undoubtedly the derivation of ancient institutions which regarded the wife as a simple appendage of her husband. In the progressive course of the advancement of Roman Law, although *manus* ultimately disappeared, yet there existed restrictions attendant on the position of a wife; and she was considered, generally speaking, as devoid of legal personality apart from her husband. Modern systems of law do not deprive of personality the woman who contracts marriage, but her *locus standi* in the sphere of law is not one of absolute independence. It would seem that the rule which invests the wife with the nationality of her husband is perfectly reasonable even at the present time, for in the actual state of society the husband is, from the point of view of private and public law, looked upon as the responsible, and therefore as the preponderant, element in the family. Such state of things would predominate as long as society rests on the basis on which it does at present.

Some countries of Latin America have expressly provided that a foreign woman who marries a native citizen takes the nationality of her husband; and should such a woman become a widow, she would retain that

[1] Constitution of 1897, Art. 6 (3). [2] Constitution of 1879, Art. 5 (2).
[3] Constitution of 1893, Art. 7 (2). [4] Constitution of 1870, Art. 35 (2).
[5] Constitution of 1829, Art 8.

nationality during widowhood. Thus Brazil,[1] Costa Rica,[2] Cuba, Ecuador,[3] Guatemala,[4] Honduras,[5] Mexico,[6] San Salvador,[7] and Venezuela[8] have included in their laws dealing with the subject provisions to this effect. In the remaining Latin American countries we have been unable to find rules on this question, but there is hardly any reason for thinking that the wife of a native citizen would be considered to be invested with any other nationality different from that of her husband.[9]

(ii) **The So-called Imposition of Nationality in Latin America.**—In view of the statements sometimes made by certain writers in connection with the manner in which some of the South American States "impose" their nationality on foreigners, it would seem imperative to add a few remarks on the subject of marriage as investing a person with the rights and liabilities of nationality. It is asserted by Hall that in Bolivia and in Uruguay every foreigner who marries a native woman becomes *ipso facto* naturalised.[10] Such a remark cannot but be considered as highly authoritative when it is remembered that it is derived from the pen of a very cautious and eminent writer. It must be objected, however, that Hall gives no authority for his statement with regard to Bolivia; and that after a careful search in the legislation of this country we have been unable to find any provisions to this effect. In fact, so far as we know, there does not exist any special law dealing with nationality or naturalisation; the only provisions on the subject that are now in force are contained in the Constitution of October 28, 1880. In view of these facts we venture to doubt the accuracy of the statement.[11]

Art. 8 of the Constitution of the Oriental Republic of Uruguay, 1830, declares to be legal citizens all "foreigners, although without children, or with foreign children, but married to women of the country, who, professing any science, art, or industry, or possessing any capital employed in business, or real property, are residing in the State *at the moment when this Constitution*

[1] Law No. 1096 of September 10, 1860, Art. 2.

[2] Law of December 21, 1886, Art. 3 (3).

[3] In this country, the foreign woman who marries an Ecuadorian takes the nationality of the husband if she establishes her domicile there. Law of August 25, 1892, Art. 20.

[4] Law of February 21, 1894, Art. 17.

[5] Law of April 10, 1895, Art. 1 (3).

[6] Law of May 28, 1886, Art. 1 (6).

[7] Law of September 29, 1886, Art. 3.

[8] Constitution of Venezuela, 1904, Art. 9.

[9] In the United States the law in this connection is not quite clear. It seems that a native woman there who marries a foreigner remains a subject of her State; but an alien woman who marries a United States citizen becomes herself naturalised. This was the law of England until 1870. See Hall, *Foreign Jurisdiction of the British Crown*, p. 41.

[10] *Foreign Jurisdiction of the British Crown*, p. 47.

[11] We have also consulted on this particular point Don Pedro Suarez, Bolivian *Chargé d'affaires* in London, who had the kindness to furnish us with the necessary information with regard to his country. He not only seemed to be surprised at the assertion of Hall in this connection, but gave it as his opinion that a native woman marrying a foreigner would lose thereby her own nationality and become invested with that of her husband.

is sworn."[1] This is the authority for Hall's statement with regard to Uruguay. *Prima facie* he would seem to be justified; but it is to be regretted that he did not inquire sufficiently into the subject. Had he done so he would have been led to put the matter differently, and thus accuracy would have been attained. Taken by itself the language of Art. 8 of the Constitution would seem to be imperative—that is to say, that nationality is actually imposed on those persons having the requisite qualification, without leaving them any option for declining it. It would appear, however, that this article is not imperative, but merely facultative. This is the view taken by the Legislature which passed the law of July 13, 1874, regulating the application of Art. 8 of the Constitution. It is thereby enacted that foreigners to whom this article refers "and who desire to take up their citizenship" shall prove before a *Juez Petrado* that they possess the requirements of Art. 8 of the Constitution, and also that they should apply to be registered as citizens. A person, therefore, who possesses the qualifications prescribed by the Constitution is still regarded as a foreigner if he has not taken the necessary steps for becoming a legal citizen.[2] It must be pointed out, moreover, that even if the article in question were imperative, the provision would hardly apply at the present time, for it refers to those foreigners who "are residing in the State at the moment when the Constitution is sworn." As the adoption of the Constitution took place on June 26, 1830, of such individuals there can be but few left, if any.

Having now made the necessary reservations in order to place the two last-mentioned countries under the plane of fairness in connection with the so-called "imposition of nationality," we may proceed to deal with other enactments on the subject, so that we may appreciate the extent to which it is insisted in Latin America that foreign residents should be invested with the national character.

In Venezuela there is a tacit naturalisation for those foreigners who own real property or who have settled there without being able to prove their foreign nationality.[3]

"Foreigners who possess real property in Brazil and who have married Brazilian women, or have Brazilian children, so long as they reside in Brazil, unless they announce their intention of not changing their nationality,"[4] are Brazilian citizens. It is likewise enacted by the Constitution of this country[5]

[1] The italics are the author's.

[2] An admirable account of the law on this point is found in the report transmitted to the Earl of Rosebery by Mr. Satow, Parl. Papers, Miscellaneous, No. 3 (1893).

[3] Cited by Lehr, *Revue de Droit International et de Législation comparée*, 2me série, tome x. p. 417. He extends this statement to Uruguay also. With regard to this country, however, we are compelled to make the same objections that we have submitted in connection with Hall's remarks as to the effect of marriage there. Our argument applies *mutatis mutandis* here.

[4] Constitution of Brazil, 1891, Art. 69 (5).

[5] *Ibid.* Art. 69 (4).

that foreigners who, having been in Brazil on November 15, 1889, did not, up to August 24, 1891, declare their intention of retaining their nationality of origin are deemed to be Brazilian citizens.

In Mexico all foreigners who acquire real property within the Republic, or who may have children born to them there, or who may serve the Mexican Government in an official capacity or accept from the said Government any title or public appointment, may elect for the Mexican citizenship.[1]

The acceptance of certain public functions by a foreigner in Guatemala [2] and San Salvador [3] *ipso facto* naturalises him. But he must possess in addition the other conditions which the law requires. Similar enactments are to be found in force in Germany and Norway.[4]

It is generally admitted that a country is entitled by the Law of Nations to refuse to admit foreigners into its territories. This being so, it follows *à fortiori* that a State has the right to prescribe the conditions under which foreigners may be allowed to settle under its dominions. International Law does not recognise the so-called right of intercourse. But in this question, just as in many others, theory and fact do not go hand in hand; the citizens or subjects of all nations are allowed to travel and settle freely in the country of their choice, provided they live in harmony with the laws of that place in which they happen to be. Accordingly it would seem unfair to attempt to state from a purely legal point of view the extent to which a State would be allowed to go in laying down the conditions under which foreigners are permitted to take up their residence in its territories. Dictates of humanity and equity, the need of intercourse with the other members of the international family, and the fear of retaliation would be powerful elements in determining the policy of a State. It seems to us sufficient, therefore, to say that it is unreasonable to insist that a foreigner should abandon his allegiance and take up the nationality of the place where he lives by the mere fact that he has acquired a domicile there, or that he is the owner of real property, or that he is married to a native woman. It is a recognised principle of law that if a thing is granted, the accessories necessary for its enjoyment must also be transferred. The acts which we have enumerated may fairly be regarded as real necessities for those who establish their residence in foreign parts.

It seems not less blamable for a State to issue provisions prescribing that the acquisition of landed property, or of a domicile, or the contracting of marriage with a native woman will naturalise a foreigner unless he announces his intention of not changing his nationality within a fixed period.[5] It is true that he is given the option of retaining his original nationality, but the fact that he is required to express his intention to that effect may in

[1] Law of May 26, 1886, Art. 1, clauses 10, 11, and 12.
[2] Constitution of Guatemala, Art. 10. [3] Constitution of San Salvador, Art. 45.
[4] Cited by Lehr, *loc. cit.* p. 417.
[5] See provisions of Brazil cited above, p. 130.

itself constitute a kind of snare, for it is difficult, and sometimes practically impossible, for a person to know the exceptional burdens or obligations which the performance of certain acts would entail.

On the other hand, to issue regulations similar in effect to those of Mexico,[1] whereby the foreigner who performs certain acts may elect for the local nationality, has nothing in itself that may be criticised as causing a hardship to the foreign element of the community. On the contrary they are placed in a favourable position if they perform certain acts, and wish to abandon their nationality in favour of that of the place where they live. Should they wish to retain their original nationality, no special duty is imposed upon them when they perform the acts that may help them in the acquisition of the rights of citizenship.

With regard to naturalisation by operation of law in case that the foreign subject has accepted any public functions,[2] we may say that we fail to see any grounds that may be brought in order to criticise it adversely. There is a universal belief that foreigners should not take part in the performance of acts having in themselves a political or public nature. If, nevertheless, they do so, and the acts in question bring upon them special liabilities in virtue of the local law, there seems to be no reason for exonerating them. The performance of such acts cannot in any way be said to be necessary for their residence in the foreign country. Hall is emphatic when he says that "if the individual does acts of a political, or even, possibly, of a municipal nature, without inquiry whether the law regards the performance of such acts as an expression of desire on his part to identify himself with the State, he has no ground for complaint if his consent is inferred, and if he finds himself burdened upon the State territory with obligations correlative to the privileges which he has assumed."[3]

IV.—NATURALISATION.

Naturalisation is an act of sovereignty, whereby a State admits a foreigner to the number of its nationals. Naturalisation properly so-called implies an agreement between the State that grants it and the individual who accepts it. As it is an act of sovereignty it necessarily follows that each State is at liberty to issue by its municipal law any regulation it likes, prescribing the conditions, the formalities, the nature, and the effects of naturalisation. As a consequence of this fact there exist great divergences in the legislation on this subject, bringing thereby frequent conflicts between the different members of the international family. The acquisition of a new nationality carries with it, theoretically at least, the necessity to abandon the original nationality. But it must be stated at once that all States have not recognised yet that a

[1] See p. 136 *ante*. A foreigner married to a native woman is placed in a favourable position for naturalisation in Argentina, Brazil, Panama, and Uruguay.

[2] See p. 136 *ante*.

[3] Hall, *International Law*, 5th ed. p. 216.

person possesses the so-called *innate* or *primordial* right to renounce his allegiance. Germany still maintains the permanent character of nationality even when her subjects have obtained effective naturalisation in a foreign country, unless they have been authorised to change their nationality and thus break the original bonds of allegiance. Allegiance is claimed by Argentina and Venezuela from their citizens even when they have been naturalised in foreign countries.[1]

Each country has the right to prescribe which State-organ has the right of granting naturalisation when the requirements of the law have been fulfilled. In Paraguay, after Congress has declared who are entitled to be naturalised, the President of the Republic will despatch the corresponding letters of naturalisation. Thus it is necessary to pass a special law.[2]

In some countries the chief of the Executive power is invested with the prerogative of granting or refusing letters of naturalisation. This is the law of Brazil,[3] Colombia,[4] Costa Rica,[5] Ecuador,[6] Guatemala,[7] and Nicaragua. In Mexico and Uruguay this right is ascribed to one of the Secretaries of State, while in Argentina it is left to the tribunals to appreciate whether the candidate has fulfilled the requirements prescribed by the law. Finally there are countries which require simply the inscription in the civil register or a declaration before the municipal council of the district in which they reside, provided they fulfil the other conditions prescribed by law.

A certain period of residence[8] is generally required in order to apply for naturalisation. In Bolivia[9] foreigners who after one year's residence express their wish to become domiciled may apply for naturalisation papers. The same enactment exists in Chile,[10] Costa Rica,[11] and Ecuador,[12] but the candidate must be the owner of real property, or of capital invested in some business or industry, or exercise some science or art.

The simple fact of residence for two years is sufficient to enable a person to apply for naturalisation according to the legislation of Brazil,[13] Honduras,[14] and Nicaragua.[15] Residence by the candidate for an equal period of time and the further requisite of possessing some real estate or working capital,

[1] Cited by Bonfils, *Manuel de Droit International Public*, cinquième édition, p. 243. In this connection it may be mentioned that Art. 7 of the Constitution of Ecuador, 1897, provides that "No Ecuadorian citizen, even though he may acquire another nationality, shall be exempted from the duties imposed by the Constitution and the laws, so long as he remains domiciled in the Republic."

[2] Constitution of Paraguay, Art. 37. Similar provisions obtain in Belgium, Denmark, and Luxemburg.

[3] Law of November 12, 1902, Art. 4.

[4] Law of November 26, 1888, Art. 18.

[5] Law of December 21, 1886, Art. 10.

[6] Law of August 25, 1892, Art. 15.

[7] Law of February 21, 1894, Art. 86.

[8] No fixed period of residence is required by the legislation of Peru. It is sufficient if the foreigner "is residing" there and exercises some trade, industry, or profession.

[9] Constitution of Bolivia, 1880, Art 32 (2).

[10] Constitution of Chile, 1886, Art. 8.

[11] Law of December 21, 1886, Art. 8.

[12] Constitution of Ecuador, 1897, Art. 6 (5).

[13] Law of November 12, 1902, Art. 5.

[14] Constitution of Honduras, 1904, Art. 8 (2).

[15] Constitution of Nicaragua, 1893, Art. 8 (2).

or professing some science, art, or industry, are required in Guatemala,[1] Mexico,[2] and Paraguay.[3]

Foreigners can obtain letters of naturalisation in Uruguay if they have fought as officers in the Uruguayan army or navy, or if they are married and profess some science, art, or industry, or own capital invested in business or real property and have in addition resided three years in the country; in the event of their being unmarried and possessing either of the preceding qualifications, four years' residence in the country are required.[4]

In Cuba foreigners cannot obtain the privileges of nationality unless they have resided for five years in the territory of the Republic; they must also have applied two years before the time for the granting of the letters of naturalisation would take place.[5]

The country that requires the longest period of residence by the foreigner in order to extend to him the rights and duties of nationality is the Republic of Panama. It is there prescribed that the candidate should have resided in the country during at least ten years, also that he should profess some science, art, or industry, or own landed property or capital in circulation. A six years' residence is sufficient if he is married and has a family in the country, and three years if married to a Panamanian.[6]

Finally the condition of residence is dispensed with in certain countries in case of a foreigner married to a native woman, of an owner of real property, or if the candidate has children born in the country, or is officially employed by the government.[7] In this connection it may be mentioned that certain persons may obtain naturalisation as a special grace from the Legislature in virtue of special services or eminent merits; in such a case it is not necessary for the candidate to fulfil the ordinary prescriptions of the law. There is legislation to this effect in Chile, Ecuador, Paraguay, and Uruguay.

Besides the general requisite of residence the person to be naturalised must prove that he has attained his majority,[8] and that he has properly conducted himself as a man and a citizen. Costa Rica,[9] Honduras,[10] Mexico,[11] and San Salvador[12] have expressly declared that naturalisation papers will not be given to persons reputed or considered in other countries as pirates, slave-dealers, incendiaries, forgers of coins, bank-notes or other

[1] Law of February 21, 1894, Art. 86. [2] Law of May 28, 1886.

[3] Constitution of Paraguay, Art. 36. This period may be abbreviated if the foreigner be married to a Paraguayan woman, and if he prove services in behalf of the Republic.

[4] Constitution of Uruguay, Art 8. [5] Constitution of Cuba, 1901, Art. 6 (3).

[6] Constitution of Panama, 1904, Art. 6 (3).

[7] See, *e.g.*, Law of Brazil of November 12, 1902, Art. 6; Law of Mexico of May 28, 1886, Art. 1.

[8] The majority spoken of here is in some States according to the laws of the candidate's country, whereas in others it is in accordance with that of the place where the person is to be naturalised.

[9] Law of December 21, 1886, Art. 9. [10] Law of April 10, 1895, Art. 13.

[11] Law of May 28, 1886. [12] Law of November 27, 1886, Art. 13.

papers representing a money value, nor to murderers, plagiarists, or thieves. In Brazil[1] no foreigner is allowed to be naturalised who, either in the country or abroad, has been convicted or sentenced for homicide, theft, robbery with violence, bankruptcy, forgery, smuggling, embezzlement, false coining, or procuring.

In some countries it is also enacted that a person whose State is at war with that of which he seeks to be a member is disqualified for obtaining the privileges and obligations of nationality.[2] And even when the person has been naturalised he is not, according to the legislation of some countries, compelled to bear arms against the country of his birth.[3]

It is of importance both from a theoretical and a practical point of view to know what is the effect of the naturalisation of the husband on the person of the wife. In Argentina, Bolivia, Brazil, Chile, Guatemala, Honduras, Nicaragua, Paraguay, Peru, and Uruguay there is no enactment dealing with this question. The wife is made to follow the nationality of the husband without any reference as to her domicile in Colombia,[4] Costa Rica,[5] Cuba, Ecuador,[6] and Venezuela; whereas in Mexico[7] and San Salvador[8] she is naturalised *ipso facto* by the naturalisation of her husband provided she takes up her residence in the country in which the husband has obtained letters of naturalisation.

The same want of provisions for ascertaining the effect of the naturalisation of the father on the person of his minor children is noticeable. We have been unable to find enactments dealing with the subject in Bolivia, Chile, Guatemala, Honduras, Nicaragua, Paraguay, Peru, and Uruguay. It is provided by the laws of Mexico[7] and San Salvador[8] that the children are made nationals of those States by the naturalisation of the head of the family, if they reside in the country that their parents adopt. In Ecuador[9] such minors are also naturalised, but they have a right of option on attaining the age of twenty-one years. In Argentina and Brazil they are not naturalised *ipso facto*, but great facilities are afforded them: thus in the former they can obtain letters of naturalisation by incorporating themselves in the national guard,[10] and in the latter they have only to make an application when attaining their majority. Finally in Colombia[11] and Venezuela they are naturalised by the act of the head of the family, without leaving them any option when coming of age.

The foreigner, as soon as he is naturalised, is entitled to exercise all

[1] Law of November 12, 1902, Art. 13.

[2] See, *e.g.*, in Costa Rica, Law of December 21, 1886, Art. 13; in Honduras, Law of April 10, 1895, Art. 12.

[3] See, *e.g.*, for Colombia, Constitution of the Republic, 1886, Art. 13; for Panama, Constitution of the Republic, 1904, Art. 10.

[4] Law of November 26, 1888, Art. 17.

[5] Law of December 21, 1886, Art. 6.

[6] Law of August 25, 1892, Art. 19.

[7] Law of May 28, 1886, Art. 2 (4).

[8] Law of September 29, 1886, Art. 3.

[9] Law of August 25, 1892, Art. 19.

[10] Law of October 1, 1869, Art. 3.

[11] Law of November 26, 1888, Art. 17.

civic and political rights. It is, however, expressly provided by most States that only native-born citizens are qualified for filling the post of President or Vice-President. Some countries disqualify naturalised persons for being appointed Senators or Deputies, whereas in others if a foreigner is to exercise either of these offices, he must have obtained letters of naturalisation for a certain period, varying from four to six years.

Some of the Central and South American States have actually incorporated in their legislation a clause which tends to avoid international conflicts similar in nature to that created by the pretentious action of the United States in claiming a right to protect one Martin Kotza, an Austrian subject. Thus it has been enacted in Costa Rica,[1] Guatemala,[2] and San Salvador[3] that a change of nationality does not produce retroactive consequences, that is to say, the obtaining or the recovery of immunities attached to the local nationality cannot be made available before the date on which naturalisation is granted; the persons naturalised are not thereby relieved of the obligations contracted by them in their country of origin before their denationalisation.[4]

A group of countries, in order to avoid vexatious conflicts of this nature, have expressly provided that if one of their citizens becomes naturalised in a foreign State he thereby loses his original nationality and therefore his right of protection from his native country. This is the law in Brazil,[5] Chile,[6] Costa Rica,[7] Guatemala,[8] Honduras,[9] Mexico,[10] and Peru.[11] In San Salvador[12] the citizen who obtains naturalisation from a foreign country in order to be considered as an alien must remove his residence from the Republic.

We have now shown the main path followed by Latin America in connection with nationality and naturalisation. It is easily seen that the tendency that prevails is to assimilate, as far as possible, with the national element the foreign members of the community. This is the reason why the *jus loci* is generally adopted, and the requirements for obtaining naturalisation are made comparatively easy. These nations possess vast territories which have not been fully exploited yet, while their population is scarce. It is, therefore, of supreme importance for them that immigrants should, as far as circumstances would allow, consider themselves as invested with national rights and duties, for if this line of action were not adopted,

[1] Law of December 21, 1886, Art. 12.
[2] Civil Code, Art. 53.
[3] Law of September 27, 1886, Art. 18.
[4] See, *e.g.*, for Brazil, Law of November 12, 1902, Art. 3; for Honduras, Law of April 10, 1895, Art. 7; for Mexico, Law of May 28, 1886, Art. 8.
[5] Constitution, Art. 71.
[6] Constitution.
[7] Law of December 21, 1886, Art. 4 (1).
[8] Law of February 21, 1894, Art. 4.
[9] Law of April 10, 1854, Art. 1 (4).
[10] Law of May 28, 1886, Art. 2 (5).
[11] Constitution, Art. 2 (5).
[12] Law of September 29, 1886, Art. 2 (4).

these countries would be placed in "the anomalous position of having many inhabitants but few citizens."[1]

Another consideration of no small importance that is bound to exert its influence on the policy of those countries in this connection is their desire to shield themselves from the exorbitant claims of some of the powerful States when one of their subjects deems himself injured while he is established in Latin America by the actions of the State. When this is the case it is comparatively easy for such individual to remember what he considers to be his original allegiance and demand the corresponding protection.

It is quite possible that this tendency on the part of the Latin American Republics has led some writers to indulge in generalisations, in an exaggerated manner, when dealing with the imposition of nationality by those States. We hope, however, to have shown how far such statements are correct.

[1] It has been expressly enacted in Brazil, Colombia, Honduras, Mexico, and San Salvador that all proceedings relating to the naturalisation of foreigners are exempt from all charges, stamps, and fees. We have not been able to find provisions in the other Latin American countries to this effect, but it is probable that the same practice is followed.

DR. MEYER'S BILLS OF EXCHANGE DRAFT CODE FROM AN ENGLISH POINT OF VIEW.[1]

[*Contributed by* ERNEST J. SCHUSTER, ESQ., LL.D. (*Munich*).]

I.—INTRODUCTION.

IF one day the unification of Bills of Exchange Law becomes an accomplished fact, this will be mainly due to the wide learning, the indefatigable energy, and the undaunted perseverance of my valued friend Dr. Meyer, whom we have the pleasure of seeing amongst us on this occasion.

By his work on the Bills of Exchange Laws of all nations, and by the Draft Code which is the subject of this paper, he has rendered a service to the science of comparative law which will never be forgotten, and which—whatever the immediate fate of his proposals may be—will be the corner-stone on which any scheme of unification must be erected.

His work is rightly based on the consideration that unification is impossible unless those concerned in its promotion possess an intimate knowledge of all the systems which it is intended to unite, and on the further consideration that a mere statement of general principles is insufficient, and that unless you test the principles by trying to embody them into a complete Code, you have no guidance as to their practicability or sufficiency.

I have said that Dr. Meyer's work on comparative Bills of Exchange Law and his Draft Code must be the corner-stones on which any scheme of unification will ultimately have to be erected, but by this I do not mean that an English translation of his draft either in its present or in any modified form ought to be enacted as the law of this country.

I will not dwell on the general objection to the introduction of apparently uniform law into countries using different languages and being under

[1] Paper read at the Conference of the International Law Association on August 5, 1910. The Draft Code which is the subject of the paper was prepared by Dr. Meyer, a member of the Berlin Court of Appeal, on the instructions of the Representative Commercial Body of Berlin, and was published as part of a comprehensive work of which the first volume gives a detailed comparative survey of the Bills of Exchange Laws of all civilised countries, whilst the second volume contains the draft with elaborate notes and an appendix containing the Buda-Pesth Rules and other material relating to the proposed unification of Bills of Exchange Law.

different social and historical influences, as this would lead me too far away from the immediate subject of this paper. I will, therefore, confine my remarks to the question as to the possibility or desirability of turning the translation of this draft into a British statute. Having done that, I propose to explain in what manner and to what extent British legislation might advantageously make use of Dr. Meyer's suggestions in connection with the proposed unification scheme.

II.—REASONS AGAINST THE ADOPTION OF A TRANSLATION OF DR. MEYER'S DRAFT.

One of the chief reasons which speak against the adoption of a translation of Dr. Meyer's draft is connected with the fact that this would have the consequence of splitting up the law as to bills of exchange into two separate parts. Dr. Meyer has rightly eliminated all questions relating to the so-called material or civil law relating to bills of exchange; his draft, therefore, does not deal with any question as to "value" or "consideration," as to the mutual rights of parties to accommodation bills, as to the right to the funds in the hands of a drawer, or other similar matters. He also, for good reasons, excludes the whole law relating to cheques. Now all these topics are dealt with by our Bills of Exchange Act, and if we adopted a translation of Dr. Meyer's Draft Code, we should, at the same time, have to enact a second Code referring to the omitted matters. This would introduce a complication which no lawyer of any experience can consider with indifference.

In the second place, the following important fact must be urged against the adoption of a translation of the draft. The statute law of every country has its own modes of expression, and this is seen in two ways: some words which in ordinary language are used in a fairly wide sense are used in a much narrower sense in the language of statutes. A conspicuous example may be found in the amended version of s. 15 of Dr. Meyer's draft (on p. 414) where the words *muss* and *soll* convey meanings which their English equivalents "must" and "shall" do not convey. An English translator who knows the distinction will no doubt give effect to it; but where is the translator to be found who is so well versed in all the niceties of German and English legal expressions that he could do full justice to the difficult task of translating the whole text of the draft? The difficulty of translation is further increased by the difference in the structure of legal phraseology. In English legal language accuracy of expression is the one thing aimed at; in the German language the desire for conciseness prevails. Owing to this difference English Courts construe an English statute in a manner differing entirely from the manner in which German Courts construe German statutes. Under these circumstances, a complete translation of Dr. Meyer's draft—which, of course, adopts the German method—would probably in many parts be interpreted

in England in a manner substantially differing from the manner in which it would be interpreted in Germany.

The third reason against the enactment of an English Bills of Exchange Law reproducing in an English garb Dr. Meyer's Code is, in my opinion, as weighty as the two others. Many rules which, owing to the existence of provisions outside of Bills of Exchange Law, operate fairly in one country, would operate less fairly in other countries where similar ouside provisions do not exist. Thus the rigid rules about the loss of the right of recourse and the extinction of rights, after a short period of prescription, contained in Dr. Meyer's draft, cannot cause much injustice in Germany, where the so-called "Bereicherungsklage" enables the aggrieved person to recover any unjust benefit acquired by any party through the operation of these rules; but in England, where such a right of action does not exist, strict insistence in the forfeiture of the right of recourse in any case where the pursuit of formalities has not been duly observed, and the introduction of a short period of prescription, would cause much greater injustice.

III.—SUGGESTIONS AS TO THE ADOPTION OF DR. MEYER'S PROPOSALS.

A.—General Observations.

I have now reached the third part of the paper. It may possibly be said that whilst I have praised Cæsar in the first part, I have attempted to bury him in the second; but in the third I have the much more welcome task of resuscitating him. The proper use that, in my opinion, can be made in this country of Dr. Meyer's draft—or of any modification thereof which is likely to gain universal assent—is to embody the substance of its main provisions, in so far as they appear acceptable, in a new Bills of Exchange Act which would take the place of the Acts of 1882 and 1906. In connection with this purpose I propose to show how Dr. Meyer deals with the principal questions, and to express my opinion as to his suggestions on the matters to which they relate.

B.—The Essential Parts of a Bill of Exchange.

In his proposals as to what are in future to be considered the essential parts of a bill of exchange, Dr. Meyer has gone very far to meet what on the Continent is called British prejudice, but what we here describe by more complimentary terms. In the amended edition of s. 15 (p. 414), the mention of a date of issue and of a place of payment is no longer an essential requisite, and even as regards the insertion of a term similar to the expression "bill of exchange" into the text of the document—for which essential many continental lawyers are prepared to die in the last ditch—Dr. Meyer is in a very accommodating disposition. According to

this proposal the absence of such an indication does not prevent a document from being deemed a bill of exchange if words like "to the order" or "not to order," or other words having a similar connotation, are inserted. The application of a little pressure will probably induce him to give way on this point also. This would mean that no requirement would in the unified Bills of Exchange Law be deemed essential which is not deemed essential in British Bills of Exchange Law at the present moment. This is as it should be; for, as stated in the Memorandum of the Institute of Bankers addressed to the Board of Trade in response to a request for an expression of opinion as to the proposed unification of Bills of Exchange Law, no international arrangement would be accceptable to the commercial community of this country by which any new formal requirement would have to be introduced into British law.

C.—Effect of Forged Indorsements.

A question of considerable importance arises in each case in which a person in good faith acquires a bill of exchange which without the true owner's assent has gone out of his possession. In order not to introduce any too complicated problems, I wish at present only to consider the case of a person who takes a bill on which the thief has forged the true owner's endorsement. Under the present English law such a person acquires no title to the bill. An acceptor who pays the amount of the bill to its actual holder remains liable to the true owner, notwithstanding that payment, but he may recover the amount paid from the person by whom the payment was received. An exception to this rule exists in the case of cheques,[1] but at the present moment I exclusively refer to such bills of exchange as are not cheques. The British rule, as may easily be shown, is very unjust in its operation, and, moreover, leads to anomalies as, in the case of the negotiation having taken place in a locality in which a title acquired in good faith through a forged indorsement is held to be good, such title will also be recognised by a British Court.[2] The rule of German law which in a somewhat modified form has been embodied in s. 48 of Dr. Meyer's draft, under which a continuous chain of indorsements confers a good title, considerably facilitates the negotiation of bills of exchange, and being less liable to create hardships than the English rule, ought to be generally adopted. I think, however, that Dr. Meyer's clause goes somewhat too far, inasmuch as it compels an acceptor to pay, even if he knows that an indorsement is forged, and has reason to doubt the good faith of the subsequent holders. No doubt s. 106 of Dr. Meyer's draft gives the true owner the right to recover the bill from a person

[1] See Bills of Exchange Act, 1882, ss. 24, 60, 82; Bills of Exchange (Crossed Cheques) Act, 1906.

[2] See *Embiricos* v. *Anglo-Austrian Bank*, (1904) 2 K.B. 870, (1905) 1 K.B. 677.

who has acquired it in bad faith; but as s. 48 stands at present, the true owner could not restrain the acceptor from paying the bill while the proceedings for the recovery of the bill are pending.

D.—Holder's Duties with Reference to Presentment for Acceptance.

The various questions arising as to the duty of a holder to present a bill for acceptance are among those in respect of which an international agreement is most desirable. Dr. Meyer's solution, on the whole, meets the requirements of commercial intercourse, but in some points his recommendations require amendment.

Dr. Meyer (in s. 39) lays down the general rule that, in the absence of a direction to the contrary, the holder of a bill is not in any case bound to present it for acceptance, but as this would obviously cause inconvenience with regard to bills payable after sight, he introduces in s. 43 a presentment for the purpose of fixing the date which is not meant to be a presentment for acceptance. I must honestly confess that I cannot conceive any circumstance under which the holder of a bill, having once gone to the trouble of presenting it to the drawer, could wish to refrain from procuring its acceptance, and I therefore think that the rule now prevailing here, as well as in most other countries, under which a bill payable after sight must be presented for acceptance, ought to be upheld.

On the other hand, I agree with Dr. Meyer in his wish[1] to abrogate the rule now existing in British law under which a bill must be presented for acceptance in any case in which it is drawn payable elsewhere than at the drawer's residence or place of business (Bills of Exchange Act, 1882, s. 39 (2)). The rule leads to obvious inconvenience in any case where the bill is received so late that it cannot be returned accepted before maturity, and the way in which this inconvenience is met by s. 39 (4) of the British Bills of Exchange Act can hardly be deemed satisfactory.

The question as to the time within which a bill payable after sight must be presented for the purpose of fixing the date of payment is dealt with by s. 43 of the draft, which provides that, in the absence of any direction requiring a speedier presentment, the presentment must take place within four months from the date of issue. Under British law (Bills of Exchange Act, s. 40) a bill payable after sight must be presented for acceptance *or negotiated* within a reasonable time. This is more favourable to holders than Dr. Meyer's proposal, but the right to substitute negotiation for presentment may have the effect of unduly retarding the presentment. As Dr. Meyer's four months allow a delay which in many cases would

[1] See the observations on p. 149 of his vol. ii.

appear to be excessive, I should suggest a combination of the two provisions, so as to make it incumbent on the holder of a bill payable after sight to present or negotiate it within a reasonable time, but with a proviso that in any case the presentment must be effected within four months after the date of issue.

The rule of British law (Bills of Exchange Act, 1882, ss. 48, 51 (2)) under which a holder who presents a foreign bill for acceptance, notwithstanding the fact that in the particular circumstances he would have been under no obligation to do so, forfeits his right of recourse unless he gives immediate notice of dishonour and takes out a protest, is inconvenient and unnecessary. If the drawer or any endorser wishes to receive immediate notice of dishonour by non-acceptance he can easily attain this object by inserting a direction in the bill or in his indorsement requiring the bill to be presented for acceptance within a stated period (see Bills of Exchange Act, 1882, ss. 33, 40 (2); Dr. Meyer's draft, s. 39 (3)). A person who, though wishing to receive speedy notice of dishonour fails to take this precaution cannot complain if the non-acceptance of the bill remains unknown to him.

E.—Holder's Rights in Case of Non-Acceptance.

Dr. Meyer, in his s. 84, rightly adopts[1] the rule of British and American law (see Bills of Exchange Act, 1882, s. 43) under which an immediate right of recourse against the drawer and indorsers accrues to the holder of a bill dishonoured by non-acceptance. The reasons speaking in favour of a universal adoption of this rule are so obvious that they require no special mention.

It follows as a necessary corollary of this rule that the holder of a bill dishonoured by non-acceptance is not bound to consent to acceptance for honour of the drawer or of an indorser which would deprive him of his immediate right of recourse (see Bills of Exchange Act, 1882, s. 65 (1); Dr. Meyer's draft, s. 70). If, as is now the case in some continental countries, the holder were bound to consent to an acceptance for honour, the drawer could in every case indicate an addressee, in case of need, whose possibly worthless acceptance would frustrate the holder's right to be reimbursed if the original drawee fails to accept.

F.—Partial Acceptance.

It would lead me too far to enter into a full discussion on the thorny subject of qualified acceptance, which plays an important and, on the whole, not very satisfactory part of British Bills of Exchange Law (see Bills of Exchange Act, 1882, s. 19). I propose to confine myself to the

[1] See his interesting statements on the present continental law and the desirability of a change in the sense indicated in the text on pp. 278-80 of his book.

question whether it is desirable that the holder of a bill should be compelled to consent to its acceptance for part only of the sum for which it is drawn. Under British law the holder may refuse a partial acceptance; under the present continental law he is, on the other hand, bound to consent to it. Dr. Meyer wishes to maintain the continental rule (see ss. 36, 37 of his draft), and (unless his s. 84 be amended, so as to give a right of recourse in respect of the deficiency) this will lead to the result that the holder of a bill for £1,000 which is accepted for one shilling must await the maturity of the bill before he can exercise any rights against the indorsers and the drawers. It would, of course, be easy to amend the clause so as to prevent this possibility, but if this were done other complications would ensue. In my opinion the British rule should be made universal.

G.—Indication of Place of Payment in Acceptance.

By virtue of s. 15 of Dr. Meyer's Draft Code in its amended form, the place of payment, that is to say. the town in which the bill has to be presented for payment and paid, though not expressly indicated in the bill, must always result from the tenor of the bill itself, and cannot be altered by the acceptor without the consent of all other parties. The acceptor can, however, by virtue of s. 35, indicate a particular locality within the town where payment has to be made, or a particular person or firm through whom the payment has to be effected. This is obviously right and convenient. The present English law gives the acceptor much wider powers; he may accept the bill payable in any town he chooses, and the holder has no right to object if he chooses a town other than the town in which he resides or carries on business. I have had personal experience of bills drawn on a London firm being accepted payable in some small provincial town, and there is nothing in the Bills of Exchange Act to prevent it.[1] An amendment of the British law on this matter in the direction indicated by Dr. Meyer's s. 35 is eminently desirable.

H.—Holder's Duties as to Presentment for Payment.

In discussing the questions arising under this head I refrain from speaking about the British days of grace. It is admitted on all sides that they must go, and it will accordingly be understood that when I speak of the due date of a bill I mean the date resulting from its literal tenor. A bill drawn at three months' date from July 1 will, if the unification scheme is carried out, be due on October 1, and when speaking of its due date

[1] A bill accepted payable in a town other than the town in which the drawee resides or carries on business and not indicated as place of payment on the face of the bill, cannot under British law be protested for non-acceptance unless the indication "and not elsewhere" is added to the place of payment, the reason being that the acceptor in such a case is bound to pay in any place in which the bill is presented to him. This reason does not, however, remove the inconvenience.

in the course of this paper I mean October 1 and not October 4. Under Dr. Meyer's draft a bill may—leaving aside the question of holidays, to which I shall have to refer hereafter—be presented for payment on the due date and may be treated as dishonoured by non-payment if it is not paid on that date, but the holder does not forfeit any rights so long as the bill is presented not later than the second working day after the due date. Under the present British law this facility is not given, that is to say, the bill must be presented on the first day on which non-payment gives the right to treat a bill as dishonoured. In my opinion this has not caused any particular hardship, but if it should be desired to give the holder a little more latitude I think one day would be amply sufficient.

The question as to the effect of holidays cannot be decided on principle; in England, Sundays, Good Friday, and Christmas Day operate in one direction, while Bank holidays operate in the opposite direction. Dr. Meyer's proposals (s. 9) that the working day next following the due date should be the date of payment is clearly acceptable.

As regards the time within which bills payable on demand (other than cheques) must be presented for payment, the present English rule is not entirely satisfactory. The rule as laid down by the Bills of Exchange Act, 1882, s. 45, as regards preservation of the right of recourse, draws a distinction between the different parties. As between the holder and the drawer a bill must be presented within a reasonable time after the date of issue, and as between the holder and any particular indorser it must be presented within a reasonable time after the date of his indorsement. The effect of this provision is always uncertain and sometimes unjust, but I cannot say that Dr. Meyer's proposal (s. 47), according to which the time within which a sight bill must be presented is, in the absence of a direction to the contrary, fixed at four months after the date of issue appears more attractive. I should, as in the case of bills payable after sight, recommend the establishment of a maximum period of four months after the date of issue, and should at the same time require each holder to negotiate or present a sight bill within a reasonable time after coming into its possession.

In connection with this point it is necessary to refer to the opinion expressed by Dr. Meyer (see s. 47 of his draft and his observations on p. 168) according to which the holder of a sight bill who does not require its immediate payment ought to be able to obtain the drawee's acceptance, and that after having procured such acceptance he ought to be at liberty to postpone presentment for payment while the period of four months after the date of issue has not as yet run out. Quite apart from the question as to whether on general principles the acceptance of a sight bill ought to be permitted,[1] there are serious objections to the power in question

[1] In England sight bills on presentation are frequently accepted payable with a banker, but this has practically the same effect as payment by a cheque on the banker—see the note to s. 41 (1) (a) in Chalmers' edition of the Bills of Exchange Act.

being given to a holder. A sight bill when it reaches the place of payment should always be presented for payment as speedily as possible.

As regards the question as to what is the proper place for presentment, Dr. Meyer in his amended s. 15 (see also ss. 35 and 44) adopts provisions similar to those contained in s. 45 (4) of the British Bills of Exchange Act, 1882.

I.—Holder's Rights against Drawee and Acceptor.

Under the present Scotch law (Bills of Exchange Act, 1882, s. 53 (2))—as also under some other systems of law—a bill operates as an assignment of funds; that being so, the holder of a bill, having knowledge of the fact that funds intended to provide for the payment of such bill have been placed into the drawee's hands, has a direct remedy against the latter. Under English law and most other Bills of Exchange Laws the holder, as such, has no rights whatever against the drawee of a bill. Dr. Meyer in my opinion rightly adopts the last-mentioned rule.

As against the acceptor the holder of a bill has in all countries a direct claim. Under English law this claim (subject to certain exceptions which may be disregarded for the present purpose) remains in force notwithstanding the fact that the bill was not presented for payment at the proper time, and that no protest was taken out or notice of dishonour given (see Bills of Exchange Act, 1882, s. 52 (1), (3)). Under the former German law the holder's right against the acceptor was, in the case of domiciled bills, forfeited, if the bill was not presented at the proper time at the place of payment, but this provision was repealed in 1908; Dr. Meyer's draft rightly maintains the principle that as between the holder and the acceptor no duty arises as to presentment, notice of dishonour, or protest.

Under the present law of most countries the acceptor, in the event of the holder failing to present the bill for payment at the proper time, satisfies his obligation by paying the amount of the bill whenever it is presented to him for payment. Dr. Meyer, by his ss. 54 and 55, proposes to abrogate this rule and to leave the acceptor[1] the option of paying the amount into court or to pay interest from the date of payment. I should have a great deal to say about the objections to this proposal, but as I understand from a private communication I have received from Dr. Meyer that he is willing to drop the proposal, it is unnecessary to refer to it at greater length.

J.—Right of Recourse.

Under English law the exercise of the right of recourse in case of the dishonour of a foreign bill by non-payment depends on compliance with three conditions: the bill must have been presented at the proper time; protest

[1] Even a drawer who has not accepted, but is willing to pay the amount of the bill, is not to be entitled to the delivery of the receipted bill unless he adds the interest.

must have been taken out at the proper time;[1] and notice of dishonour must have been given at the proper time. As regards compliance with each of these conditions, relaxations of the rule and exemption are allowed so as to meet special cases of hardship or injustice (see Bills of Exchange Act, ss. 46, 50, 51 (9)), but subject to such relaxations and exemptions non-compliance with the rules entirely loses the right of recourse.

Under Dr. Meyer's draft (see ss. 49, 56, 86) the omission to present and protest a bill at the proper time causes the forfeiture of the right of recourse without any reference to the mutual positions of the parties, but failure to give notice of dishonour, though making the defaulting party liable in damages, does not itself cause the forfeiture of the right of recourse (see s. 67).

The rigidity of Dr. Meyer's rule as to the consequences of the omission to present and to take out protest at the proper time is, as I have already explained, mitigated by the fact that the outside law in Germany allows a "Bereicherungsklage" which prevents any person from deriving an unjustifiable benefit through the forfeiture of the right of recourse. In a country like England, where this kind of action does not exist, the absence of relaxation and exemptions would in many cases operate harshly and unjustly.

As regards the form of the protest, Dr. Meyer (in s. 61) adopts the newly introduced provisions of the German Bills of Exchange Code (Art. 88a), according to which the protest instead of being contained on a separate instrument is to be placed on the bill. This is no doubt an advantage, as it saves the trouble of having a copy of the bill, and it is to be hoped that the limitation of space will curtail the length of the protest; a short statement like "Bill presented on July 19 at 1 p.m. to Charles Smith, partner in firm of acceptors. Replied: cannot pay. (Signed) Thomas Jones, Notary Public," is amply sufficient. These simplifications if introduced will, it is hoped, also reduce the costs of protest, which at the present moment are absurdly high in this country.

Dr. Meyer's proposal (s. 67) to shift the duty of giving notice of dishonour on the official by whom the protest is taken out (except in cases where no protest is required) does not recommend itself to me. As his clause is worded the official in question would himself have to bear the consequences of any neglect or omission, and the additional trouble and risk thus imposed on him would of course have to be paid for by an increase of the charges.

As far as my own experience goes the practice and theory as to notice of dishonour are widely apart; the holder of a bill on which default has been made as a general rule returns it to the person from whom he received it, who in his turn returns it to the previous indorser, and no further notice of dishonour is given. Under s. 49 (6) of the British Bills of Exchange Act the return of a dishonoured bill to the drawer or an indorser is in

[1] For the sake of brevity I do not notice the exceptions arising in cases in which directions dispensing with protest are given by the drawer or any indorser.

point of form a sufficient notice of dishonour, but such notice operates as against the particular party to whom the bill is returned, and events are conceivable in which the omission to give notice to the other parties may prejudicially affect the rights of the person by whom the bill was presented for payment; the possibility of such an event occurring is, however, very remote, as each indorser on receiving the returned bill will naturally protect himself by forwarding the bill to the person who indorsed it to him. However this may be, as between the party who returns a bill and the party to whom it is returned, no other notice should be required.

At first sight Dr. Meyer's proposal to preserve the right of recourse in the case of omission to give notice of dishonour, but to make a party guilty of such omission liable in damages, appears to be to the holder's advantage, but this is not always the case. If the party from whom the bill was originally received is solvent, the right of recourse against other parties is quite immaterial to the holder, and if the loss of the right of recourse is the only consequence of the failure to give notice to such other parties, the practice of omitting the notice in their case cannot be hurtful; if, however, each party can claim damages in any case in which the omission to give notice has injured him, the matter becomes much more serious.

Nobody who has any experience of the large number and partial illegibility of the indorsements which sometimes appear on bills coming from the Continent can look with equanimity on a proposal which makes it a practical necessity to give notice of dishonour to the drawer and to every person whose name appears as an indorser.

K.—Payment for Honour[1] of the Drawer or an Indorser.

Under the present German law the holder of a bill on which the name of a referee "in case of need" appears, must in the case of default of payment present it to such referee if he resides or carries on business in the place where the bill is payable (Art. 56). Under British law (Bills of Exchange Act, 1882, s. 15) presentment to the referee in case of need is optional; Dr. Meyer (in s. 69) adopts the British Rule, but his reasons for this course do not convince me. As a matter of practice the references in case of need are usually resorted to on the non-payment of a bill, and I think it is on the whole desirable that this should be done, as a drawer or indorser who has indicated a referee in case of need may be exposed to a serious loss if the holder fails to take advantage of the indication; where the reference is to parties with an ascertainable address at the place of payment the inconvenience to the holder is not very great. I should therefore recommend the adoption of the German rule.

[1] I omit to deal with the questions arising as to acceptance for honour, as their special discussion would occupy too much space.

Another divergence between English and German law is found in the fact that under German law no one except a person indicated on the face of the bill as a reference in case of need is entitled to intervene in case of default. Under s. 68 of the British Bills of Exchange Act any party may, in the event of a bill having been protested for non-payment, pay such bill for the honour of any party liable thereon, or for honour of the party for whose account the bill is drawn. In the case of competition between several interveners the one who liberates most parties has to be chosen. This rule has obvious advantages and has been rightly adopted by Dr. Meyer (s. 70). As I have spoken in favour of compulsory presentation to the addressee in case of need, I should of course recommend that in the case of a competition between a referee in case of need and a voluntary intervener, the same rule should be observed as in the case of a competition between several interveners.

IV.—CONCLUDING OBSERVATIONS.

I have had to pass over many matters which in my opinion call for special criticism or for special commendation. This course was necessitated by the limits of space which are imposed by the conditions of the occasion on which this paper is presented. Moreover, it is somewhat premature to enter into a minute examination of the draft before it has been remodelled—as it undoubtedly will be [1]—by the deliberations of The Hague Conference. On the remodelled draft the bodies representing banking and commerce in this country will no doubt be called upon to pronounce an opinion, and then the time will have arrived for dealing with the whole subject in a comprehensive manner.

The opinions of men having practical experience of the incidents in the life of a bill of exchange, and more particularly of a bill of exchange which has travelled through several countries, will then have to be taken into account, and it will also be necessary to take into consideration the economic objects which a sound Bills of Exchange Law ought to have in view. An international bill of exchange is *drawn and negotiated* for various purposes: for recovering the price of goods or Stock Exchange securities forwarded from the drawer's country to the drawee's country; for taking advantage of a favourable exchange, or of a favourable rate of interest in the drawer's country; for the mere purpose of raising money, and for a variety of other purposes. A bill of this description is *purchased* with the object of paying for goods or Stock Exchange securities forwarded from the drawee's country to the purchaser's country; for the purpose of covering exchange or credit transactions, and for a variety of other purposes. In a particular place and at a particular time the person who wishes to negotiate

[1] I understand that The Hague Conference has in the meantime concluded its deliberations and agreed upon a Draft Code.

a bill for any of the purposes I have mentioned does not always meet with a person who wishes to purchase a bill for the corresponding purposes; moreover, the bills offered may be payable at distant dates, while the bills wanted may be sight bills or short-dated bills. In practice, this difficulty is overcome by middlemen who make it their business to be always ready to buy bills as they are offered, and to draw and sell bills as they are wanted. In the machinery of commerce the persons or firms who act as such intermediaries perform a most useful function, and a sound Bills of Exchange Law ought to consider them more than any other class of persons who are likely to be parties to bills of exchange; if unnecessary risks and troublesome formalities are imposed on such persons, they must recoup themselves by additional profits which must operate as a tax on all commercial transactions involving the use of bills of exchange, and therefore prejudice the interests of all other parties. These and similar considerations must not be lost sight of when a revision of British Bills of Exchange Law in connection with the unification scheme will come within the region of practical politics, but though they may in some respects lead to deviations from the path pointed out by Dr. Meyer, that will not detract from the gratitude and admiration which all persons interested in the matter must feel for the intrepid pioneer of the unification of Bills of Exchange Law.[1]

[1] Since this article was written, "Correspondence relating to the Conference on Bills of Exchange at The Hague, June 1910," has been published: Commercial, No. 4 (1910).—*Note by Editors.*

BREACH OF PROMISE OF MARRIAGE.

[*Contributed by* EDWARD MANSON, ESQ.]

How marriage originated, whether it was an instinct of primitive man or grew out of a state of promiscuity or polygamy or the communal group, or superseded matriarchy, how it was affected by the customs of endogamy, exogamy, and totemism, all these questions make a "very pretty quarrel," as Sir Lucius O'Trigger would say, in the rival theories of Maine and McClennan, Morgan and Lang; and the anthropological experts must settle it: "procul, O procul este profani." But the institution of marriage being once started, it seems generally agreed that the favourite mode of carrying it on was from a very early period by the capture of brides. Capture in its turn yielded in time to purchase—still common among uncivilised races—and with purchase begins the long, long history of the marriage contract. Betrothal—a very ancient custom—was the preliminary bargain to settle the terms of purchase prior to the ceremony of marriage—the terms, be it observed, not merely the price. For the bride-sale was a very different thing from the sale of a slave girl, a mere chattel. When Abraham's servant comes to ask Rebekah's hand of her father Bethuel, and her uncle Laban, and brings forth jewels of silver and jewels of gold and raiment, Rebekah's kinsmen give her away to be Abraham's "son's wife,"—the only son—the son "to whom he had given all his wealth," to be the mistress in fact of a great patriarchal household.[1] In the earliest form of marriage at Rome, known as *coemptio*,[2] the bride was sold by *mancipatio* for an *as* in the presence of witnesses, but the *mancipatio* was only what we should call the formal conveyance—delivery of possession. It was preceded by a betrothal—*stipulatio*—securing to the bride the dignity and honour of a materfamilias and mistress of the household, and out of this stipulation an action for breach of promise—*actio ex sponsu*—arose among the Latin tribes: so says Servius Sulpicius, a jurist who died 42 B.C. In later times

[1] In the case of Jacob's betrothal to Rachel, there is a curious parallel to his serving his father-in-law Laban seven years for his bride in Mr. Northcote Thomas's *Marriage Customs of the Edo-speaking Peoples of Nigeria* (see p. 95 *supra*). In addition to payments he says, "When the bride is young the suitor does a certain amount of work on the farm of his future father-in-law, and helps him in such tasks as house-building."

[2] Some high authorities, it should be said, hold *confarreatio* to be the earliest.

the *sponsalia*, or ceremony of betrothal, took place at the house of the woman's father in the presence of the respective parents (*sponsores*), when the day of marriage was fixed and the marriage contract agreed. Parties to the *sponsalia* might still resile, and if they did, could not be compelled to complete the marriage; but although an agreement between the parties to pay a specified penalty on a breach of the promise was regarded as a *pactum turpe*, and, as such, was void, the party withdrawing did not, in the law of the Empire, escape scot-free, as he (or she) forfeited the *arrha* (or earnest) given at the time of the betrothal (Cod. 5, 1, 1, 5; *ibid.* 3, 4, 14; *ibid.* 5, 17, 2).[1]

Among the Teutonic tribes, the bride-sale of which Tacitus speaks in the Germania (c. 18) was—as among the Hebrews and the Romans—much more than a mere sale. It was, as Sir F. Pollock and Professor Maitland point out (*Hist. of Eng. Law*), a sale not of a chattel, but "of the *mund*—the protectorship over the woman. An honourable position as her husband's consort and yoke-fellow was assured her by the solemn contract. This need not," as these learned authors go on to add, "imply that the woman herself had any choice in the matter. . . . Though no doubt her kinsmen may make a profit out of the bargain, as fathers and feudal lords will in much later times, the more essential matter is that they should stipulate on her behalf for an honourable treatment as wife and widow." If either of the parties to the contract in those early English betrothals refused to perform his part of it, they were to suffer a money penalty: if it was the

[1] Mr. J. C. Ledlie of the Privy Council Office, a well-known authority on Roman law, has sent me the following note on the subject: "There are, as usual, many debated points in regard to the subject of Breach of Promise in Roman law, but it is agreed that in the law of the later Republic and of the Empire a promise to marry (*sponsio, sponsalia*) was *not* actionable. It is also agreed that in the other Latin communities a promise to marry *was* actionable down to the lex Julia of 90 B.C., which extended the Roman *ius civile* to those communities. Whether such a promise was *ever* actionable in Rome is very doubtful. Ihering (*Geist des röm. Rechts*, ii. 223) is strongly of opinion that it was *not*, but many writers of great authority (*e.g.* Girard) hold otherwise. Ihering considers the non-actionability of a promise to marry to be a necessary consequence of the fundamental principle of Roman marriage law, viz. the absolute freedom of each party in the contracting as well as the dissolving of marriage. 'In contrahendis nuptiis libera potestas esse debet,' Codex, 5, i. 5, 6; 'Pacta ne liceat divertere non valere constat.' An actionable promise would, in Ihering's view, have been a clog on this freedom. During the earlier Republic it appears to have been open to the parties to stipulate for a penalty to be paid by the party breaking the promise, but in the later law such a stipulation was treated as *pactum turpe*, and could be met by *exceptio doli*. See Bryce, *Studies in History and Jurisprudence*, ii. pp. 393-4. The title of the Digest dealing with *sponsalia* is 23, i., but nothing is there said about their non-actionability. The principal texts on the subject are Dig. 45, i. 135 pr. and Codex, 5, i. 1, and 8, 39, 2. Where (as was frequently the case) *arrha sponsalicia* had been given on the betrothal, a breach of the promise (in Justinian's law) involved forfeiture thereof, unless the engagement was broken off by mutual consent or for a *iusta causa* by one party only. But though *sponsalia* were not actionable, to enter into double *sponsalia*, *i.e.* to engage oneself to B while an engagement with A was still subsisting, involved *infamy*. The Canon Law on the subject was, of course, different."

bridegroom who refused, he forfeited what he had paid by way of bride-price; if it was the parent who refused, he had to pay back the bride-price and one-third more with it. This was the rule of the early Church. But when the Church came to exercise exclusive jurisdiction in questions of marriage and had adopted the principle of the Civil Law *consensus facit nuptias*, it went a great deal further than this bare penalty. There were two kinds of betrothals or espousals recognised by the Canon Law—"sponsalia per verba de præsenti" and "sponsalia per verba de futuro, repromissio (*i.e.* reciproca promissio) futurarum nuptiarum," and of both of these the Ecclesiastical Courts decreed specific performance, but with a slight difference. In the case of espousals "per verba de præsenti," the parties were sentenced to celebrate the marriage "in facie ecclesiæ," and in default might be excommunicated and imprisoned on a writ *de excommunicato capiendo* until he or she submitted to obey the ordinary.

"But as for persons," says Swinburne, "who had contracted sponsals only *de futuro*, if either of them did refuse to perform their promise the judge was not to proceed to the significavit in chancery for an *excommunicato capiendo*, but to prevent further mischief by compelling them to go together which did hold one another: yet was not this froward party thus to be dismissed, but was to suffer penance for the breach of his promise; nor was he or she to be dismissed or absolved if those sponsals *de futuro* by reason of carnal knowledge or some other act equivalent did become matrimony. For in that case as in the former, where sponsals were contracted *de præsenti* the disobedient party was to be excommunicated, apprehended, and imprisoned, and not to be absolved or released before satisfaction or death or other just cause of divorce" (Sponsals 1, 17).

In both cases the foundation of the jurisdiction was the same. The parties by plighting their troth (*fides data*) had created an obligation cognisable in the Spiritual Courts, and enforceable by penance or excommunication (*ne fidem fallerunt*), and this "wholesome" discipline of the Church was not to be interfered with merely because such a marriage might not turn out a happy one. That was a secondary consideration. This ecclesiastical jurisdiction to compel a celebration of marriage was abolished in England in 1754 by Lord Hardwicke's Act (26 Geo. II. c. 33); but in the interval (1732) Chief Justice Raymond had delivered his important judgment in *Holt* v. *Ward* (2 Str. 937) fully recognising the right of action—even by an infant—for breach of promise of marriage, and the above Act expressly saves the right to claim damages for the breach of such a promise in an action on the case.

"Formerly," says the Chief Justice, "it was made a doubt by my Lord Vaughan whether any action could be maintained on mutual promises to marry, but that is now a point not to be disputed. And as to the present case we should have had no difficulty in giving judgment for plaintiff if we could have been satisfied by the argument of the civilians

that as the plaintiff was of the age of consent any remedy, though not by way of action for damages, could be had against her. But since they seem to have no precedent in the case, we must consider it upon the foot of the common law. And upon that the single question is, whether the contract as against the plaintiff was absolutely void. And we are all of opinion that this contract is not void but only voidable at the election of the infant; and as to the person of full age, it absolutely binds. The contract of an infant is considered in law as different from the contract of all other persons. In some cases his contract shall bind him: such is the contract of an infant for necessaries, and the law allows him to make this contract as necessary to his preservation. . . . Where the contract may be for the benefit of the infant or to his prejudice, the Court so far protects him as to give him an opportunity to consider it when he comes of age, and it is good or voidable at his election.[1] But though the infant hath this privilege, yet the party with whom he contracteth hath not: he is bound at all events. And as marriage is looked upon as an advantageous contract and no distinction holds whether the party suing be man or woman, but the true distinction is whether it may be for the benefit of the infant, we think that though no express case upon a marriage contract can be cited, yet it falls within the general reason of the law with regard to infants' contracts. And no dangerous consequences can follow from this determination, because our opinion protects the infant even more than if we rule the contract to be absolutely void. And as to persons of full age it leaves them where the law leaves them which grants them no protection against being drawn into inconvenient contracts."

This ruling of Lord Raymond is as true to-day as it was a hundred and eighty years ago, that the exchange of mutual promises to marry creates an actionable contract—an enforceable obligation.[2]

In thus holding we differ from nearly every European country, and the most curious thing about the difference is the reason of it. We in England have always been accustomed to plume ourselves on the freedom of choice which attaches in our country to marriage. Marriages, we say, are not "arranged"; inclination is not fettered. Yet by a strange irony it is on this very point on which we pique ourselves that we stand impeached. Foreign nations refuse to enforce a promise to marry or to recognise it as giving rise to an action for sentimental damages, and why? Not because "at lovers' perjuries they say Jove laughs," but because to do so would

[1] The Infants' Relief Act, 1879 (which applies to promises to marry by an infant—*Coxhead* v. *Mullis*, 3 C.P.D. 439), only further protects the infant by making such promise not merely voidable, but void.

[2] On May 6, 1879, the House of Commons on the motion of the late Lord Herschell—then Mr. Herschell—passed a resolution abolishing the action for breach of promise "except in cases where actual pecuniary loss has been incurred by reason of the promise, the damages being limited to the amount of such pecuniary loss"; but the proposal has never got any further.

be to trench on the absolute freedom of choice which should prevail until the actual ceremony. As in Roman law, it is *pactum turpe*.

France.

Thus by the law of France all promises of marriage are invalid "comme portant atteinte à la liberté illimitée qui doit exister dans les mariages." But if special damage (*préjudice*) can be shown to have resulted from non-fulfilment of the promise, the amount of such damage can be recovered; as where the engagement has been announced, say, in the society papers, and the refusal to marry is calculated to injure reputation, or where "la grossesse de la fille" has resulted or expenses been incurred; but loss of the chance of an establishment is not a "préjudice," though that word has a wide signification, moral as well as legal. But in any case the damages are due *ex delicto*, not *ex contractu*.

Portugal.

The Civil Code of Portugal of 1868 (Art. 1067) expresses it thus: The consent of the parties in view of marriage cannot be given irrevocably, but by the act of celebration only. Consequently, all engagements by which the parties purport, under the form of betrothal or in any other manner, to bind themselves by promises to contract marriage are null and void, and it makes no difference whether such engagements do or do not contain penalty clauses.

This Article will not, however, prevent a person who, in pursuance of a promise of marriage, has received gifts or authorised expenditure being compelled to make restitution of that which he or she has received or to pay an indemnity if the other party requires it.

Spain.

By the Spanish Code of 1889, promises of marriage do not carry with them an obligation to contract marriage. No tribunal will allow a person to claim performance (Art. 43).

If the promise has been made by public or private act by one *sui juris* or by a minor assisted by the person whose consent is necessary to the celebration of the marriage, or if the engagement has been announced, the one who refuses to marry without legitimate cause will be obliged to indemnify the other party against the damage resulting from the promise of marriage.

The action for damages must be brought within a year from the date of the refusal to celebrate the marriage.

Holland.

Holland has the same rule against enforcing promises of marriage; but when the official notification—the first step towards marriage—has been given, the publication of it will found a damage action.

Art. 113 of the Code (1886) runs as follows:

Les promesses de mariage ne donnent point d'action pour contraindre au mariage ni en dommages-intérêts s'il y a eu violation des promesses: toutes stipulations en dommages-intérêts de ce chef sont nulles.

Cependant lorsque la déclaration du mariage à l'officier de l'état civil aura été suivie d'une publication, il pourra y avoir lieu à une action en dommages-intérêts à raison des pertes réelles que l'une des parties aura faites par suite du refus de l'autre de contracter mariage: il ne sera pas tenu compte du gain dont elle aura été privée. Cette action se prescrit par dix-huit mois à dater de jour de la première publication.

Germany.

Germany deals very carefully with this subject in ss. 1297–1302 of its Civil Code. These sections in Mr. E. J. Schuster's English version run as follows:

Family Law: Betrothal.

1297.—No action can be brought upon a betrothal for the fulfilment of the promise to marry. A promise to pay a penalty in case of the non-fulfilment of the promise is void.

1298.—If a betrothed person withdraws from the betrothal, he or she shall compensate the other party to the betrothal, the latter's parents, and any third parties who have acted *in loco parentis*, for any damage caused by their having incurred outlay or obligations in expectation of the marriage. He shall also compensate the other party to the betrothal for any damage which the latter suffers through having in expectation of the marriage taken other measures affecting his or her property or employment.

The damage shall be made good only in so far as the incurring of outlay and obligations and the other measures were reasonable under the circumstances.

The duty to make compensation does not arise if a grave reason for the withdrawal exists. [The burden of proof is upon the defendant.]

1299.—If a betrothed person causes the withdrawal of the other party to the betrothal by any fault which constitutes a grave reason for the withdrawal, the former is bound to make compensation in accordance with 1298, pars. 1 and 2.

1300.—If a betrothed woman of unblemished character has permitted the other party to the betrothal to cohabit with her and if the conditions specified in 1298 or 1299 exist, she may also claim an equitable compensation in money on account of the injury which is not an injury to property. [*i.e.* Loss of virginity.]

The claim is not transferable and does not pass to his heirs, unless it has been acknowledged by contract or action has been commenced to recover it.

1301.—If the marriage is not concluded, either party to the betrothal may demand from the other the return of what he—or she—has given to the other as

a gift or as a token of the betrothal in accordance with the provisions relating to the return of unjustified benefits. In case of doubt, it is to be presumed that the claim for return is barred if the betrothal is dissolved by the death of one of the parties to the betrothal.

1302.—The claims specified in 1298–1301 are barred by prescription in two years after the dissolution of the betrothal.

The Swiss Civil Code, 1907.

This is the latest embodiment of legislative wisdom on the subject.

Des Fiançailles.

91.—La loi n'accorde pas d'action pour contraindre au mariage le fiancé qui s'y refuse.

L'exécution des peines conventionnelles qui auraient été stipulées ne peut être réclamée.

92.—Lorsqu'un des fiancés rompt les fiançailles sans de justes motifs, ou lorsqu'elles sont rompues par l'un ou l'autre à la suite d'un fait imputable à l'un d'eux, la partie en faute doit à l'autre, au parents ou aux tiers ayant agi en lieu et place de ces derniers, une indemnité équitable pour les dépenses faites de bonne foi en vue de mariage.

93.—Lorsque la rupture porte une grave atteinte au intérêts personnels d'un fiancé sans qu'il y ait faute de sa part, le juge peut lui allouer une somme d'argent à titre de réparation morale si l'autre partie est en faute.

94.—Les fiancés peuvent, en cas de rupture, réclamer les presénts qu'ils se sont faits.

95.—Les actions dérivant des fiançailles se prescrivent par un an à compter de la rupture.

To these "législations romaines," as a writer calls them, the Scandinavian peoples present a marked contrast, as illustrated in the Swedish Code. Betrothal in Sweden is a "demi-mariage." It is a formal ceremony which takes place in presence of the "giftoman" and four witnesses, two on each side. Starting from this view of betrothal—as a "demi-mariage"—the law treats those "qui se fiancent au mépris de fiançailles précédentes" as if they were guilty of "demi-bigamie," and punishes them by fine accordingly.

Sweden.

Chap. III.—Des Promesses de Mariage, ou Fiançailles.

1. Lorsque on veut faire des fiançailles ce doit être devant le giftoman et quatre témoins, deux du côté du futur mari et deux du côté de la future. Dans le cas contraire les fiançailles sont nulles si le giftoman en demande la nullité, et chacun de ceux qui se sont fiancés illégalement est puni d'une amende de dix dalers, qui sont attribués aux pauvres : il n'y aura pas d'amende si les fiançailles sont ratifiées par le giftoman.

2. Si l'on s'oblige par écrit à contracter mariage et si le giftoman y donne son adhésion, aucun des deux obligés n'aura le droit de rompre la promesse et de contracter un autre mariage.

3. Si un autre que le giftoman a consenti aux fiançailles . . . il sera puni d'une amende de quinze dalers et les fiançailles seront nulles.

4. Si le giftoman fiance une fille à plusieurs il paiera trente dalers.

5. Celui qui se fiance avec une femme qui l'a déjà été régulièrement avec un autre paiera quinze dalers et elle trente. Si tous les deux étaient déjà fiancés avec d'autres, chacun paiera trente dalers. Si ils ont ensemble un commerce charnel ils seront punis comme il est dit au Titre Pénal, et tout ce qu'ils se seront donné mutuellement sera confisqué au profit des pauvres. Celui qui se fiance deux fois paiera trente dalers; les premières fiançailles resteront valables quoique la seconde fiancée ait conçu de ses œuvres. Si la première fiancée ne veut pas se marier avec lui, il se mariera avec la seconde.

6. Si sans le savoir un homme contracte des fiançailles avec une femme fiancée déjà ou à l'inverse il ne sera pas punis et le coupable seul paiera trente dalers.

7. Si les deux fiancés sont également cause de la nullité des fiançailles tout ce qu'ils se seront donné mutuellement sera confisqué au profit des pauvres et chacun paiera une amende de vingt dalers.

9. Si la fiancée devient enceinte des œuvres du fiancé, celui-ci devra se marie avec elle que les fiançailles aient été faites sous ou sans conditions, et dans le premier cas que ces conditions aient été ou non remplies. Si le fiancé veut se soustraire au mariage et s'il persiste dans sa résistance, la fiancée sera declarée sa femme légitime et aura sur ses biens les droits résultant du mariage.

Scotland.

"A promise of marriage," says Erskine in his *Principles of the Law of Scotland*, "may by our law be safely resiled from so long as matters are entire." This statement of the law is not now correct (see Fraser H. & W., 2nd ed. p. 487), and Scotland must be grouped with those countries like England, the United States, Ceylon, etc., which recognise the "repromissio futurarum nuptiarum" as binding in law. If the "sponsalia de futuro" have been followed by copula on the faith of the promise, Scotch law goes further, and treats the promise—being perfected by consummation—as "ipsum matrimonium"; but under ordinary circumstances the only redress competent to the party adhering to the promise and wishing it fulfilled is an action for damages against the person refusing. At one time only patrimonial loss could be recovered in such an action, such as the purchase of wedding clothes or any similar expenses. It is now, however, settled that damages may be recovered not only for patrimonial pecuniary loss, but as solatium for the wrong done and, as stated in an old case, for the "loss of the market" (see Fraser H. & W. 2nd ed. p. 487).

Cape Colony.

Under modern Roman-Dutch law as illustrated in this Colony, betrothal involves a legal obligation to marry, the breach of which gives rise to an action of damages. Prior to 1838 the injured party had the option of claiming either damages or specific performance, but the latter remedy was abolished by the Marriage Order-in-Council of September 7, 1838.

Ceylon.

In Ceylon—where the Roman-Dutch common law also obtains—actions to enforce marriage were disallowed by Ordinance No. 6 of 1849, s. 30, but actions for damages were allowed to continue. By a subsequent Ordinance (No. 2 of 1895, s. 21) "no action shall lie for the recovery of damages for breach of promise of marriage unless such promise of marriage shall have been in writing."

United States.

The law here follows very closely that of England. "Though marriages, and promises to marry," says Mr. Bishop (*Marriage and Divorce*), "are supposed to proceed from sentiment, and to be superior to pecuniary considerations, yet the law takes cognisance of them as things of money value. And it furnishes pecuniary redress for breaches of the agreement to marry. The complaining party is ofttimes the woman, but action lies equally by the man against her or jointly against her and the man to marry whom she broke her engagement.

General Conclusion.—To sum up the result of the survey. Specific performance of a promise to marry has become an anachronism, and has been generally abandoned as not conducive to happy unions. So far in the other direction has the pendulum swung that with the large majority of continental countries a promise of marriage creates no actionable right. The remedy is confined to special damage in the nature of tort flowing from the breach.

England, Scotland, the United States and modern Roman-Dutch law take a middle course. A promise of marriage without being specifically enforceable is still a valid contract, and the breach of it gives a cause of action. Nor does there seem any sufficient reason why it should not do so. It may be a good thing, as continental nations think, that a promise of marriage should not be irrevocable, that there should be a *locus pœnitentiæ*, but if a man changes his mind without just cause, why should he not pay for his fickleness? Is he to be a chartered libertine, free to trifle with the affections of the other sex, perhaps to blight their matrimonial prospects for life, and no Nemesis overtake him? If the action is being abused—brought for blackmailing purposes by a designing woman—the remedy is always in the jury's hands. They can mark their disapproval by awarding what Lord Bramwell called "the contumelious farthing."

THE EFFECT OF A PROMISE TO MARRY.

Apart from the actionability of a promise to marry, there is much of interest to be gathered from a comparative study in regard to what a promise to marry implies. Here in England, for instance, the contract is not one

uberrimæ fidei, that is, the parties are not bound to disclose—as in life assurance—everything which might reasonably affect the mind of the other party in entering into the contract. The lady does not warrant, for instance, what Cockburn C.J. called "the virginity of her affections," that it is a case of first love, nor is she bound to confess that the luxuriant locks which her lover admires are only a wig, or her teeth false, or that she has run into debt; these are things the fiancé may be left to find out for himself. She is not even bound to disclose that she has been confined in a lunatic asylum shortly before the promise was made, if she was sane at the date of the promise (*Baker* v. *Cartwright*, 10 C.B. N.S. 124); nor need she tell her lover when she accepts his offer that she is already engaged to another man (*Beachey* v. *Brown*, E.B. & E. 796). It is only fair, however, to warn young ladies who may think of acting on this last decision that its correctness has been doubted by an eminent Scotch lawyer. In Roman law it involved "infamy," see p. 157*n*. America adopts the same principle as to the obligation, or rather non-obligation, of candour. "When a man," says an American judge (*Gring* v. *Larch*, 112 Pa. at p. 249), "enters into an engagement of marriage with a woman, he is presumed to have made himself acquainted with her appearance, her temper, her manners, her character, and other matters which are obvious to the understanding, and which can be ascertained in the social intercourse which usually accompanies courtship. If he changes his mind and refuses to marry her for a defect which is open to observation and which he might have ascertained before by reasonable care, it is no defence to an action for breach of promise of marriage." In fact, the good old rule of *caveat emptor* applies. "Open to observation," in the above citation, no doubt creates a difficulty, having regard to the resources of modern art: for as Sir Benjamin Backbite in *The School for Scandal* remarks of Mrs. Evergreen, "There's no judging by her looks unless you could see her face!" Sir Thomas More, it may be remembered, dealing with marriages in *Utopia*, discusses this difficulty and solves it in his own Utopian fashion by what may be called a "private view" by discreet friends on both sides.

But this principle of the engaged parties taking one another with the risk of all their imperfections has its limits. If, for instance, after a man has made a promise of marriage he finds the woman is quite different from what he had reason to think her, that she has led an immodest life before the date of the promise, this goes to the root of the contract, and he may refuse to perform his promise (*Foulkes* v. *Sellway*, 3 Esp. 236; *Beachey* v. *Brown*, E.B. & E. 796; *Young* v. *Murphy*, 3 Bing. N.C. 54), but to justify his resiling in such a case she must be a woman of general bad character; it is not, *semble*, enough that she is a lady "with a past," neither can the want of virtue be made a ground of defence to an action for breach of promise if the man knew of it when he promised. This is equally accepted in England and America (*Johnson* v. *Traves*, 33 Minn. 231).

By English law chastity and modest conduct *after* the promise is a condition subsequent (*Jones* v. *James*, 18 L.T. 243). Roman-Dutch law is more strict. Under it a promise to marry implies a warranty against past or future unchastity (Maasdorp's *Institutes*, pp. 12, 13); but this warranty does not arise in the case of a widow or where the loss of virginity is not due to any voluntary act of unchastity—such, say, as befell Tess of the D'Urbervilles. This, at least, is the view of Voet (23, 1, 14). Pothier in his *Traité du Contrat de Mariage*, ii. 1, 7, intimates a different opinion.

Conversely the lady may—in England—cancel her promise on account of the bad character of the man. "If," said Lord Ellenborough in *Leeds* v. *Cook* (4 Esp. 256) "the plaintiff has conducted himself in a brutal or violent manner and threatened to use her ill, a woman under such circumstances has a right to say that she will not commit her happiness to such keeping." But she must show that the man is a man of bad character. The accusation is not enough (per Gibbs C.J., *Badeley* v. *Mortlock*, 1 Holt 151). Mere rudeness—according to the law of Scotland—is not sufficient justification (Stoole, 1870, 8 M. 613).

Time.—A general promise to marry is, by English law, a promise to marry within a reasonable time (per Lord Ellenborough, *Potter* v. *Deboos*, 1 Stark. 82). If the promise is indefinite, the party to whom it is made may call upon the maker to perform it at any convenient time (*Atchison* v. *Baker*, 2 Peake N.P. 103). By Roman-Dutch law betrothal also involves an obligation to marry within a reasonable time, and an action for damages will even lie against the executor of a deceased promisor who has unduly delayed the fulfilment of his promise. This is not so by English law or American law (Bishop, M. & D. s. 194) or Scotch law (Fraser H. & W. i. s. 488). The contract is a personal one; but if special damage can be proved to have resulted from the breach, an action may lie against the executors of the deceased promisor (*Finlay* v. *Churney*, 20 Q.B.D. 494); or by the administrator of the deceased promisee (*Chamberlain* v. *Williamson*, 2 M. & S. 408), because the estate of the promisee, in such a case, would have been the richer but for the wrong.

A promise is sometimes made to marry on the happening of a certain event, *e.g.* the death of the promisor's father. Then the event must be awaited (*Cole* v. *Cottingham*, 8 Car. & P. 75), but even here if the promisor declares his intention never to fulfil his contract, the promisee may at once bring her action (*Frost* v. *Knight*, L.R. 7 Ex. 111; *Donoghue* v. *Marshall*, 32 L.T. 310). It is now settled after some judicial controversy that a promise by a married man to marry another woman when his present wife dies, is contrary to public policy and void (*Wilson* v. *Carnley*, *Spiers* v. *Hunt*, [1908] 1 K.B. 729). And the same rule obtains in America.

"To hold such a promise valid would be," as Lawrence C.J. of Illinois said (*Paddock* v. *Robinson*, 14 Amer. R. 112), "to introduce into social life a dangerous and immoral principle . . . only in the most corrupt conditions

of society could such agreements be tolerated as lawful. They are in themselves a violation of marital duty, and the persons who make them are morally unfaithful to the marriage tie."

Fitness for Marriage.—A promise to marry in Roman-Dutch law implies a warranty against any defect which is inconsistent with the objects of marriage, such as impotence or incapacity; and see Pothier's *Traité du Contrat de Mariage*, 21, 7, 60. It also implies a warranty against any infectious disease such as leprosy or syphilis, and by American law a man or woman making a marriage engagement is justified in presuming—in the absence of any notice to the contrary—that the other party is fit for marriage, and either party finding this not to be the case may break off the engagement (*Gring* v. *Larch*, 112 Pa. 244).

A more difficult question is whether a disqualification for marriage arising subsequently to the promise will entitle the promisor to break off the engagement. In *Atchison* v. *Baker* (2 N.P.C. 103) a widower of forty, in good health at the time, proposed marriage to a widow of the same age. Afterwards the widower developed an abscess in the breast: the widow refused to carry out the engagement, and the Court held that she was justified in doing so; but in a subsequent case (*Hall* v. *Wright*, E. B. & E. 746), where the promisor had fallen into a consumption and refused to fulfil his engagement on the ground that marriage would be dangerous to his health, a majority of the Court held that such a plea was no good defence to the action. This decision has been much criticised. It would not be followed in Scotland (Fraser H. & W. i. s. 219). Certainly the American rule on the subject seems preferable. "If either party should after the promise become by the act of God, and without fault on his own part, unfit for the relation of marriage, and is incapable of performing the duties incident thereto, then the law will excuse a non-compliance with the promise—the main part having become impossible of performance, the whole will be considered to be so" (Allen, 1882, 41 Amer. R. 444).

Change of Religion.—According to writers of authority, a change of faith by one of the engaged parties may justify the other in breaking off the engagement; if, for instance, a Christian turns Mahometan, or Jew, or Anabaptist, or even a Quaker; but this last proposition seems extravagant, though certainly the Rev. Sydney Smith did once in a fit of irresponsible frivolity, express a wish to "roast a Quaker"—"just one!"

MONEY-LENDERS IN INDIA.

[*Contributed by* I. B. Sen, Esq.]

History tells us that Edward the Confessor, having heard it said in the Court of the King of the Franks that usury was the root of all vice, made laws in England in the middle of the eleventh century by which all usurers were to be banished and all persons convicted of the crime of usury to be outlawed. Usury included all money-lending with a view to gain. It had been forbidden by two Northern Synods in 787 A.D. It was a thing unlawful under Canon Law. Now it became a crime in Christian England. William the Conqueror allowed the Jews to settle in England. They were forbidden by their personal law to lend upon usury to a brother Jew but not to a stranger. So the Jews practised money-lending in England and had for a time the monopoly of the trade—a monopoly that cost them dear. But before the expulsion of the Jews from England in 1290, the Christian in fact competed with the Jew in money-lending, the prohibition of the Church and the State notwithstanding. And from 1290, when the Jews were banished, till the middle of the seventeenth century, when Cromwell allowed them to return to England, money-lending was carried on in England in the absence of the Jew by the Christian laity and often by the clergy themselves. The Church went on denouncing money-lending as a sin and the State devised measures for its suppression—measures that were prompted as much by the ostensible desire to enforce the Christian ideal as by the less evident though more potent consideration of filling the treasury. Towards the end of his reign Henry VIII. passed a statute which aimed at stricter and more effective prohibition of money-lending by providing definite punishment for all loans, direct or indirect, that reserved interest higher than 10 per cent. per annum. There could be no mistake as to the object of the statute, which sought to root out usury by means of punishment not only of the lender as stated above, but also of the borrower in certain cases of indirect usury. The people perversely enough, and with the help of the legal profession of course, construed the statute to sanction usury not exceeding 10 per cent. per annum in its rate of interest. The omission of the statute to provide for punishment of a part of the unlawful acts of usury, namely, loans at not more than 10 per cent. per annum, was cited as proof that the statute sanctioned and legalised such loans. The religious zeal of the reign of Edward VI. gave rise to a new statute

which clearly stated that this interpretation was wrong and forbade in so many words the taking of any interest whatever upon any loan of money upon the penalty of forfeiture, imprisonment, and fine. But the people took little heed of the law. They went on evading the law lawfully when they could and unlawfully when necessary. Such of them as cared for justification of usury on principle found it in the continental theologian Calvin and in the continental jurist Molinæus. Then Queen Elizabeth's attention was drawn to this "detestable" sin "forbidden by the law of God." In 1571 she repealed the statute of Edward VI., revived the statute of Henry VIII. and supplied the omission in the latter by making loans at not more than 10 per cent. punishable but less severely than loans at above 10 per cent. were. Doubtful of success with the unaided strength of secular law, Queen Gloriana enlisted the service of a second knight and called in to her aid the corrections and punishments of ecclesiastical law. Indeed, Queen Gloriana seems to have been pleased with the achievements of her knights, for a quarter of a century later she made the statute perpetual. But the dragon, if it was one, was not slain. Early in the reign of James I. we find Bacon voicing the public opinion and defending usury apologetically on the ground that "there must be borrowing and lending" and that it cannot be "free," *i.e.* without profit, because "men are so hard of heart." And for the first time in the history of England the State gave up attempts upon the life of the supposed dragon. The statute 21 Jac. I. c. 17 was the first that proceeded upon recognition of the fact of money-lending and yet not against it. James I. had however to quiet the conscience of his bishops by declaring money-lending to be opposed to religion and conscience. He did by the same statute fix the maximum rate of interest at 8 per cent., which had been in point of fact, but against the law of the land, 10 per cent., from the time of Henry VIII. Driven from pillar to post, henceforth the State tried for two centuries and more to keep in its hand the power of fixing the rate of interest. The maximum rate of 8 per cent. fixed by James I. was within a quarter of a century reduced to 6 per cent. during the Cromwellian period. About sixty years later Queen Anne reduced it to 5 per cent. This gradual reduction of the maximum rate of interest was, so the statutes recited, due chiefly to foreign and in particular Dutch competition in the English money-market. Towards the close of the seventeenth century Sir William Petty and Locke showed the futility of this attempt on the part of the State to fix the rate of interest. But the English economists were divided in their opinion. As late as the close of the eighteenth century Adam Smith himself took no exception to a legal rate which in his opinion should be a very tittle above the lowest market rate. It was reserved for that dauntless iconoclast Jeremy Bentham to free England from this idol of the tribe by his defence of usury in 1787. And in 1854 in the reign of Queen Victoria all usury laws were repealed, leaving money-lending to be a lawful

occupation and the rate of interest to be fixed by contract between the lender and the borrower.

Whether at any very early stage of ancient Indian civilisation the Hindus tried to suppress money-lending altogether, is not known. The oldest record of Hindu law that has come down to our times contains no evidence of any attempt to root out money-lending from society. On the contrary we learn from Goutama that as early as 600 B.C., probably much earlier, money-lending was recognised by the Hindus as a lawful occupation. The problem before the Hindus at that early period was much the same as that enunciated by Bacon in the seventeenth century A.D., namely, how might "the tooth of usury be grinded that it bite not too much." They solved the problem by providing two remedies, both tried independently in Rome at two far removed periods. The first remedy was to fix the maximum rate of interest, as the Twelve Tables did in Rome in the fifth century B.C., and as England did from 1624 to 1854 A.D. Goutama laid down that all interest above the fixed rate of 15 per cent. per annum was illegal. The second remedy provided in Goutama was a check upon accumulation of interest. It is interesting to note that this latter remedy was also tried in Roman law in the sixth century A.D. when Justinian's Code would not allow any interest to be demanded beyond twice the principal. In Goutama the law is that "the principal can only be doubled by length of time after which interest ceases." In other words exigible interest must not exceed the principal in amount.

Some four centuries later we come to the Institutes of Manu, that wonderful product of far-sighted sagacity and short-sighted self-love, of rigorous discipline to realise most noble ideals and indulgent allowance for common human frailty. In Manu, as is well known, we find society classified into four principal castes, the highest being the sacerdotal or the Brahmana, the next in rank the military or the Kshatriya, and the next the commercial or the Vaishya. All the three, being entitled to spiritual re-birth in this life, were called the twice-born castes. The fourth caste was that of the once-born Shudra or the servant. In this society aristocracy was spiritual and intellectual. Rank depended upon spiritual and intellectual culture—and not upon "possession of dirt" as in the middle ages of Europe. And there was some provision for elevation of the members of a lower caste to a higher one and for degradation of those of the higher to a lower. The highest caste, the Brahmana, lived by teaching the Vedas, officiating at a sacrifice, and by the agreeable occupation of receiving presents from pure-handed donors. The occupation of the military caste was to bear arms. The lowest of the three twice-born castes, the Vaishya, had money-lending for its occupation besides trade, agriculture, and attendance on cattle. The occupation of the once-born Shudra was service for hire.

Now, at all normal times each class was to pursue its own occupation and the Vaishya alone could lend money, for, says Manu, "his own office

though defectively performed is preferable to that of another, though performed completely, for he who lives by the acts of another class immediately forfeits his own." It is remarkable how law-abiding the Hindus were even in that early period of the history of mankind. This strict rule of conduct was followed in those days as implicitly as the cabmen obey the outstretched arm of the policeman in the streets of London to-day.

In times of acute distress, however, the rigid rule was relaxed, and if a Brahmana or Kshatriya or Vaishya could not live by his proper occupation, he could take to the occupation of a caste lower than his own but not that of one higher. The main exceptions to this rule were that neither the priest nor the soldier could take to menial service for hire nor practise one of the four occupations of the commercial class, namely, money-lending, for Manu says "neither a priest nor a military man must receive interest on loans." The result was that according to the Code of Manu at all times, normal or abnormal, the Vaishya or the commercial class alone could practise money-lending lawfully.

We do not know whether at any earlier stage the Hindus were forbidden to lend money to their co-religionists or fellow-tribesmen. Judging from the evidence of their attitude towards money-lending, it would be nothing surprising if it were so. But certainly even at this early period of the Institutes of Manu, the Hindus had outgrown that doubtful and friction-producing virtue which we notice among the Jews, the ancient Romans, and the Mahomedans, namely, of not accepting interest from one's own tribe, caste, or fellow-believer. Not only was the Vaishya money-lender entitled to interest from a borrower of equal or inferior caste, but also from one of either of the two superior castes.

The two safeguards against the evils of usury that we noticed in Goutama were provided also by Manu, who fixed the maximum legal rate of interest for all ordinary cases and restricted the accumulation of interest. Here under the former head Manu lays down that with the security of pledge the maximum rate of interest was to be 15 per cent. per annum as in Goutama and without the security of pledge the maximum rate was to be "in proportion to the risk and in the direct order of the classes," *i.e.* 2 per cent. a month from a priest, 3 per cent. from a soldier, 4 per cent. from a merchant and 5 per cent. from a servile man or mechanic. This scale of interest does not conform to our modern notion of the risk attendant upon the occupation of a priest, soldier, merchant, or mechanic. But we must judge of the risk in the light of the conditions of life that prevailed at that far-off infancy of history. And we may also note that in ancient India of this period as in the Roman Empire of Justinian's time and in mediæval Europe under the later canonists they had class legislation and they considered the question of interest relatively to the class of society concerned. But Manu clearly saw the modern economist's doctrine of interest being the price of use of money and of the risk. We notice also

a movement towards the contractual rate of interest. Says Manu, "Whatever interest for price of the risk shall be settled (between the parties) by men well acquainted with sea-voyages or journeys by land, with times and with places, such interest shall have legal force." The advanced character of this system of law will be fully realised when we remember that money-lending was unlawful in England till A.D. 1624, that from 1624 to 1854 a legally fixed rate of interest was the only lawful one recognised by the English Courts, and that the free contractual rate was legalised in England within the memory of living persons.

The relaxation by Manu of the rules in times of distress was taken advantage of by the later law-givers in developing the law of money-lending. When we come to the later compilation of Yajnavalkya we find that in times of distress, but not in normal times, the lowest of the four castes, the Shudra, is allowed to lend money upon interest which in the days of Manu was the exclusive privilege of the next higher caste. This was a long step forward. The Shudra, though inferior in caste to the Vaishya, is allowed to practise the occupation of the higher caste, if he cannot subsist by his proper occupation of service for hire. The Brahmana, the highest caste, is also allowed to practise money-lending in times of distress. With those whose rights it enlarges, distress tends to become chronic.

> "Who dares not stir by day, must walk by night;
> And have is have, however men do catch."

About the sixth century A.D. Vrihaspati allows the Brahmana, the highest caste, lawfully to carry on money-lending with the help of the law of agency, even in normal times. Vrihaspati says: "A twice-born man may practise money-lending, agriculture, and trade not conducted in person." We thus come to the stage in which as a matter of fact all the castes do lend money lawfully. Possession, originally not quite genteel, has grown, mellowed by age, into respectable ownership.

As to rate of interest, we noticed even in the time of Manu the movement towards legal recognition of the contractual rate. Later on Yajnavalkya amplifies the doctrine laid down by Manu and ordains that "all borrowers, who travel through vast forests, may pay 10 [per month], and such as traverse the ocean 20 in the 100 to lenders of all classes (according to circumstances), or whatever interest has been stipulated by them (as the price of the risk to the lender)."

The rule checking accumulation of interest, whereby interest exceeding the principal in amount could not be demanded, continued in force all along and has come down, as we shall see presently, to our own times under the name of "damdupat."

Before I take leave of the Hindu period, I should draw your attention to one feature of the adjective law bearing upon the subject. It is well known that in all ancient states—China, Babylon, Egypt, Greece, and

Rome—money-lending eventually led to enslavement of the defaulting insolvent debtor. Solon was forced to find a remedy for the evil in Athens, and in 594 B.C. by proclaiming a general "seisachtheia" or shaking off of burdens, for the first time introduced into Europe the laws of bankruptcy. More than five centuries later Julius Cæsar found it necessary in 48 B.C. to develop the Law of Bankruptcy in the Roman legal system. In the Code of Manu, however, this legal development is absent. We know that about 300 B.C. Megasthenes, a Greek ambassador who lived in Bengal for some years, noted with admiration the absence of slavery in India. But in Manu's time slavery was certainly not unknown in India, though the Hindu law relating to slavery was elaborated at a later period. Even in Manu's time a clear distinction was made between a servant and a slave, the latter being incapable of having wealth exclusively his own, for that belonged to his master. Though a defaulting debtor could be arrested and forced to repay the debt by personal labour provided he were not a Brahmana, and provided also he were not of a caste superior to that of the creditor, the defaulting debtor, according to Manu, did not become a slave. And Manu further laid down: "The sum lent to a person in distress can give rise to no interest because then such interest would be extortionate." But neither this rule nor the combined effect of the two other remedies referred to before could or was intended to prevent the degeneration of repayment of debt by personal labour into enslavement of the debtor. Debt being a sin, money lent must be repaid by the debtor, and, in case of his death before repayment, by his sons and even grandsons provided the debt had not been incurred for an immoral purpose, and this though the sons and grandsons had received no assets from the deceased debtor. It is evident that discharge of the debtor on the ground of insolvency would be out of place in such a system.

India came under Mahomedan influence in the eleventh century A.D. A Mahomedan is forbidden by his religion to lend money upon interest to a Mahomedan. "They who devour usury shall not arise from the dead but as he who ariseth whom Satan hath infected by touch," so says the Quoran. The doctors of Mahomedan law, however, say that interest may be taken from a hostile infidel. But, in fact, even between Mahomedans the injunction is evaded by legal fictions, the best known of which is *bai-bil-wufa*, or sale of the security by the borrower with a condition of re-purchase from the lender at a higher price—a fiction that was frequently resorted to in England in the fifteenth and sixteenth centuries. But openly Mahomedan Law has never recognised money-lending as lawful. As a matter of fact, Mahomedan money-lenders progressing with the time received interest from the faithful and the unfaithful alike in spite of the prohibition of the Quoran and the doctors. And the Mahomedan rulers of India did not interfere with the Hindu law of money-lending. That is how matters stood when the British period in India commenced in the latter half of

the eighteenth century. All classes of Hindus could and did practise money-lending under the sanction of their law. And the Mahomedans theoretically could not, but in practice did, lend money on interest. The English in England were then at the stage in which money-lending was permitted but subject to maximum legal rates of interest—a stage, as we have already seen, not in advance of that of the Hindus. So the English passed regulations in India to fix the rates of interest, and further to restrict the accumulation of interest by making the rule of "damdupat" generally applicable to all money loans outside the Presidency towns, whether by Hindus, Mahomedans, or others. These Regulations were passed between 1793 and 1827. We have already seen how the usury laws were repealed in England in 1854. The plausible doctrine of the fur-coat of Canada being unsuited for India does not appear to have grown up then. So in 1855 all laws in force relating to usury were repealed in India also, leaving the parties entirely free to make their own terms as to the rate of interest. But the conservatism of the English judges of the various High Courts in India has managed to keep alive one rule of ancient Hindu Law of Usury. To-day the only surviving relic of the remote past is the Hindu rule of "damdupat," which still forbids the Hindus—Hindus only—of the two cities of Calcutta and Madras and of the whole of the Presidency of Bombay to demand at any one time from any Hindu debtor interest exceeding the principal in amount.

With the above exception and with the exception of the absence of compulsory registration of money-lenders in India, their legal position is the same in India as in England. I do not believe compulsory registration to be necessary in India. I never saw there the altruistic circular of some of the London money-lenders reading "Loans upon notes of hand. No security demanded. No inconvenient questions asked." But though the West is more aggressive in its method than the East, "Will you walk into my parlour?"—the old invitation of the spider to the fly—is not unknown in the hospitable East. For that we have a sufficient legal remedy in the equitable rules as to fraudulent or unconscionable bargains. An administrative remedy in the shape of Co-operative Credit Societies has recently been borrowed from Germany upon which it is too early yet to pronounce judgment. It is needless to add that slavery—unmasked slavery—is there no more. And the unlucky borrower can, when necessary, get himself white-washed by the laws of insolvency upon the usual terms. In India, with a population of nearly 295 millions, there are about 420,000 money-lenders and bankers, of whom, it is interesting to note, 17·4 per cent. are women. Of these 420,000 11 per cent. carry on their business in cities. The Mahomedan money-lender is not rare. He openly receives interest from the faithful and the unfaithful without troubling seriously about his resurrection. To borrow the words of Shylock, he knows "the way to thrive and he is blest." I have also come across Mahomedans who, as late as 1904, found it necessary to resort to the legal fiction of

bai-bil-wufa and seek to establish the apparent character of sale by hiding its real character of mortgage in order that they might take with an easy conscience and an untarnished social name interest on money lent even to hostile infidels, who in this case were the sons of a deceased British colonel. And there are thousands of venerable Mahomedans whose ideas are somewhat out of date but who religiously follow the Prophet's precept regardless of their material interest. The Hindus, as might be expected from the history I have sketched out, have no such prejudice against receiving interest. In fact, as the Indian saying goes, "cream is sweeter than milk, grandson than the son, interest than the principal." But it will not be difficult to find to-day many thousand Hindus who still look down upon money-lending and will not receive interest from a brother-man. But not only is money now borrowed to be used as capital, but the debtors are now very often artificial persons, *e.g.* the State, municipal corporations, companies. When the debtor happens to be an impersonal person—if I may use such an expression—there is no occasion for sentiment in the creditor and he does not hesitate to receive interest from such artificial or juristic person. At this stage one hesitates to receive interest from Lord Morley, but not in the least from the Government of India. Not long afterwards one sees the anomaly of this attitude of mind and takes up the more logical position. I have not seen this stage of illogical attitude and practice noted in any account of the gradual improvement of the attitude of the English society towards money-lending. I cannot, therefore, say if the above remarks apply to the English, though I have reasons to believe they passed through such a stage at one time. But I know of this illogical intermediate stage among the Hindus. Gradually the irrational sentiment disappears and interest is received without hesitation from a brother-man. Charity ends and fairness begins. That has been going on in India under the present altered economic conditions.

In the big towns, which are few, a large portion of the borrowing is to supply capital for commercial purposes. In the rural parts a large portion of the borrowing is to supply capital for agricultural purposes, secured often by mortgage even of future crops. But in both the places quite a considerable portion of the borrowed money goes to meet private as opposed to commercial and agricultural demands upon the debtor's purse. A large number of persons are affected by such loans. I do not feel sure how far law could keep them out of debt. Education of the masses, teaching them to take care of themselves, appears to me the only sure remedy for this evil—far surer than the primitive remedy of the patriarchal days which sought to keep one portion of the people under perpetual tutelage by keeping another portion under constant ineffectual chastisement. But the Anglo-Indian administrator, liable to a common human frailty, is most reluctant to part with the rôle of the patriarch. And the Government of India has no money to spare for mass education.

In the meantime the evils of usury are partially kept down by the laws of insolvency to which the people are by their national tradition averse, by competition among money-lenders themselves and by the equitable rules as to unconscionable bargains.

A few words about the ubiquitous class of money-lenders in India known popularly as the Marwari. Without a reference to him a paper on the subject would be incomplete. He is a Jaina or a Hindu from Rajputana or the Punjab. He is to be seen everywhere in India, even in the remotest and unhealthiest village. He still evinces a sort of contempt for Western education and Western ways. A born business man and book-keeper, law-abiding almost to a fault, more abstemious than the proverbially abstemious Hindu, adventurous and industrious, a persevering fatalist, he is almost invariably successful in all his undertakings. He is the Jew of India. He usually combines the business of a retail miscellaneous tradesman with that of a money-lender. The unthrifty among the local people dislike him because he lends them money upon terms to which they agree and sells them goods on credit which they themselves ask for. He keeps away from the Criminal Court but is often to be seen in the Civil Court.

To conclude. Is it not remarkable how strikingly similar is the progress of the human mind and march of the human institutions in the East and in the West? If one will only read between the lines, one cannot help noticing how amid the seeming variations, which are non-essential, there is the essential unity of a movement towards the Golden Age that awaits alike the East and the West in the future. The East and the West have been converging towards the Golden Age before them, not diverging from a golden age behind them. True, in the East as in the West the progress has at intervals been through narrow passes and over steep heights; even these impediments were useful though they made the progress slow. The points of essential resemblance, I repeat, have always been far more numerous than those of non-essential difference. And that was in the days when the East and the West knew not each other and each thought that Goshen was in its own land and in particular in its own tribe. Now that time and space have shrunk and the barrier of languages can be easily scaled, does it become economists and votaries of Science to circumscribe their vision by artificial limits of a supposed "occidental commonwealth"? I confidently believe that the West will again seek for inspiration, not in the transitory Kipling but in the immortal Goethe—that the West will again sing not "East shall be East and West shall be West," but

> "God's is the Orient,
> God's is the Occident."

A GERMAN VIEW OF ENGLISH LAW.[1]

[*Contributed by* JAMES EDWARD HOGG, ESQ.]

DR. GERLAND has recently published a book consisting of over 1,000 pages on the subject of the English Judicial System, and the value of this work from the point of view of comparative law is considerable. The author claims to have given a complete account of all the various tribunals, as they now exist, which go to make up the judicial system of England. Scotland, Ireland, the Channel Islands, and of course the oversea dominions are outside the scope of the work. As a matter of fact a good deal more has been included than an English writer would think necessary to justify the title of the book, for among "Courts" public offices like the Land Registry, Middlesex and Yorkshire Registries, etc., are dealt with. There are two main parts of unequal length, the first devoted to the Courts and their Organisation, the second (of little more than 100 pages) devoted to what are styled the remaining organs of the judicial system. Part II. deals with the laying of informations and complaints, the legal profession, and the functions of the Home Office and Parliament in the administration of justice. Part I. has two divisions, of which the second relates to the *personnel* of the judges and officials of the Courts. It is the first division of Part I. (consisting of nearly 800 pages) which contains the matter of principal interest, and is concerned with the Courts themselves. There are three heads. Under the first head come the ordinary Courts, inferior and superior. Under the second head come Courts and tribunals of "voluntary" jurisdiction (such as the land and deeds registries, Patent Office, Charity Commissioners, etc.), "special" Courts (such as the Railway and Canal Commission, military Courts and spiritual Courts), "local" Courts (such as the London Courts, Palatine Courts of Lancaster and Durham, University Courts of Oxford and Cambridge, etc.), and lastly what are called "Arbitration Courts"—including arbitration in general under the Arbitration Act, 1889. The third head deals with the relations between the different Courts, by way of appeal and as regards the authority of cases decided by them.

This summary shows that a wide survey of our system of administering

[1] *Die Englische Gerichtsverfassung.* Von Dr. Heinrich B. Gerland. (G. J. Göschen'sche Verlagshandlung, Leipzig, 1910.)

justice has been taken. What historical matter there is is interesting, and there is little to complain of in the way of omission. The Isle of Man and India should have been included (on p. 282) among the dominions whose appeals go to the Privy Council, but a full account of colonial appeals does not fall within the scope of the work.

The professed object of Dr. Gerland's book is to present a view of our English system to German readers, in order, as he says in his preface, to help on the scientific study of jurisprudence on the Continent by filling the considerable gap that continental jurists have found to exist in the materials available for their study of English law and administration of justice.

The interest of the book for English readers is, of course, an interest of another kind. Incidentally a good deal of valuable material has been gathered together—some of it from out-of-the-way places—which is even more useful to English than to German lawyers. The principal reason for the book appealing to English lawyers is that the independent account and criticisms of our institutions by a foreign author draws our attention to features in our law—both its theory and practice—that are otherwise forgotten or overlooked. Only by having the peculiarities of our own legal system emphatically brought under our notice, and by being thus compelled to institute comparisons between our own and other people's systems of jurisprudence, is any substantial advance to be secured in the direction of making our own system more scientific and therefore more useful from a strictly practical and utilitarian standpoint. It has been well said of lawyers—and the remark applies to English lawyers in particular—that they are in danger of forgetting that the law is made for man, and not man for the law. Dr. Gerland criticises our English jurisprudence freely and sometimes severely. If we cannot agree with him altogether, we cannot help admitting that improvement is much needed, and is by no means impossible to effect.

One of the peculiar features of English law is the extreme difficulty, as compared with continental systems, of ascertaining its rules and principles and of understanding them sufficiently for practical application. Not only is this stated pretty plainly by Dr. Gerland, but it is obviously the fact apart from his direct statements. This difficulty is referred to in the preface, and appears incidentally throughout the body of the book. "The labyrinths of the English common law and statute law" are feelingly recalled in the preface, and on p. 772 some hard knocks are dealt in the course of a criticism of our "patchwork" of case law. But the difficulty of grasping some of the leading conceptions of English law is even more clearly shown in the handling of parts of the discussions on the meaning of particular developments. Thus, the significance of the reform effected in 1875 by the Judicature Acts is discussed at p. 297 *et seq.* The conclusion reached is that the essential feature of the reform, that in which lies its peculiar significance, is the abrogation of the distinction and opposition between

law and equity. Now it is no doubt to be expected that some day the rules of law and the rules of equity will cease to be distinguished in virtue of their different origin, and will simply be rules of jurisprudence administered by the Courts without specific reference to their origin. But that time has not yet arrived, and the only "fusion" that can so far be said to be completely effected is simply a fusion of administration—the rules both of common law and of equity being administered by the same Court. The very ability with which this subject is discussed by Dr. Gerland only sets in a clearer light the inherent difficulty he has in grasping the English distinction between law and equity. The difficulty of ascertaining and understanding English law is further shown by this fact: Dr. Gerland has made use of many summaries and expositions produced by English writers, and has thereby been saved the enormous labour of going back in every instance to the original authorities; nevertheless, he complains of the intricacy and obscurity of our law.

Another feature of English law is its relative failure to secure the boon of prompt, inexpensive, and satisfactory litigation with respect to commercial business. Dr. Gerland lays great stress on this, and returns to the charge again and again, insisting that commercial business shuns the Courts, and that the English judicial system is quite behind the times in providing facilities for the expeditious settlement of business disputes.

Naturally the question of the possibility of reforming the English system —both as to substantive jurisprudence and the administration of justice by the Courts—is touched on by Dr. Gerland. With respect to the administration of justice by the Courts, the circuit system meets with his unqualified disapproval. A good deal of current literature on this subject is referred to, and the conclusion arrived at is that the days of the circuit system as it now exists are numbered; moreover, reform of the circuit system means reform of the whole judicial system (pp. 608, 609). The remedy for the waste of judicial power and time that at present goes on under the circuit system probably lies in the direction of decentralisation. If permanent Courts of the standing of the High Court and the Court of Appeal were established throughout the country, instead of in London only, a comparatively small increase in the judicial staff would effect an enormous saving in the time, money, and worry now expended on litigation and general legal business.

With respect to reforms other than those of mere procedure and administration of justice, Dr. Gerland thinks our system of case law shocking. Bad as it undoubtedly is from the point of view of really scientific law, and responsible as it is for many subsidiary defects in our whole system of jurisprudence practical and theoretical, this part of the criticism on English law and practice will commend itself to English readers less than any other of Dr. Gerland's strictures. It is possible, indeed, on this point to criticise the critic effectively on a definite matter of principle. Discussing

the whole question of law made by precedent, or judge-made law, Dr. Gerland ridicules the notion of mere precedent making law, and says with some rhetorical effect for the moment that English law will remain in its present backward state of development so long as "the later judge is bound by the decision of the earlier" (p. 771). Now there is one fundamental difference between the English and continental systems of jurisprudence whieh goes far to deprive this scorn of precedent of its justification. The difference alluded to is one that is constantly noticed throughout the book, and is this: many officials on the Continent bear the name and exercise the functions of a "judge" which in England belong to officials who, whatever their judicial functions, are not in England styled "judges" or given the consideration due to a judge. Persons whom we call in England masters, registrars, even arbitrators, are all classed in Germany as "judges." Consequently "judge"-made law may seem to a German rather a poor thing. Further, continental writers do not always take into account the broad distinction between judges of the superior Courts and judges of the inferior Courts. The decisions of County Court judges emphatically do not make law. The decisions of High Court judges may very well do so. The elevated and honourable position of our judges of the superior Courts is referred to more than once by Dr. Gerland, who, in fact, points out with great acuteness that any sensible increase in their number would tend to diminish the weight of their authority. The importance of the circumstance that it is only judges of the superior Courts who can be said to create law by means of precedents seems to have been overlooked in this connection.

All this notwithstanding, Dr. Gerland's remarks on the obstacles that English case law presents to codification are extremely interesting and valuable. But here again he might have admitted what has been noticed by more than one English writer—that we in England are proceeding, though slowly, towards codification, whilst on the other hand the continental systems are more and more attaching importance to precedent, and allowing their judges to be bound by the decided case.

In conclusion, Dr. Gerland's work is a notable book and well worthy of perusal by English lawyers.

SOME NOTES ON EAST AFRICAN NATIVE LAWS AND CUSTOMS.[1]

A FURTHER collection of these fast vanishing native customs will, the Editors are sure, be acceptable to readers of the Journal.

The fundamental ideas amongst most of the native tribes in East Africa regarding questions of family relationship are:

(1) That individual members of a family form the wealth and strength of the united family;

(2) That females cannot inherit and cannot dispose of property;

(3) That females are themselves property to be bought and sold in marriage, to be assigned in payment of debt, and to be owned and inherited by their male relations.

In fact, the female members of a man's family are as much a part of his property as his cattle, and often the most important source of his income.

Given this conception of society in the minds of primitive savages, whose crimes are commonly the instinctive crimes of passion, it naturally follows that such offences as murder and rape are regarded by them in a very different light from that in which they present themselves to our eyes. Murder is regarded as a loss of strength caused to the family of the person murdered, which may be compensated by the murderer replacing the murdered man with others. Rape of an unmarried woman is regarded as so much loss caused to her owner in the price procurable for her in the marriage market, which may properly be compensated by damages.

In short, these offences which we consider as offences against the person, are regarded equally by the natives as offences against property.

The idea common to civilised nations of a crime such as murder being an offence against society and of such fictions as the "King's Peace," has no place in the native mind.

Thus, a native whose unmarried daughter has been raped considers that justice is incomplete if the perpetrator of the deed, in addition to any other punishment he may be awarded, is not compelled also to refund him damages for the pecuniary loss he himself has suffered.

These instances are referred to more particularly to show how essential to any effort to administer substantial justice to the natives is the possession of some knowledge, not only of their customs, but of their manner of regarding the main features of social life.

[1] Reprinted from East Africa Protectorate Reports, vol. i., compiled by Mr. Justice Hamilton.

The valuable provisions of Article 20 of the Order-in-Council of 1902 are not to be misconstrued into an authority for administering justice to natives in the "rough-and-ready" style, of which some affect to think highly, but which is generally but the sign of a lack of experience or of sympathy and patience, and not infrequently results in what is in reality rough-and-ready injustice.[1]

Every judicial decision where natives are concerned is a stone in the foundation of Government, and in order to be in a position to give a right decision it is above all things necessary that the judge should get to the real kernel of the matter, though at first sight it may appear to him to be incomprehensible, trivial, or even ridiculous.

Where values are quoted in the following pages it must be remembered that they are liable to fluctuation—according to the wealth of the tribe and the general prosperity depending on the seasons. Rupee currency is gradually taking the place of cattle or goats for the expression of terms of value.

Wanyika.

This is a generic term for a number of more or less allied tribes inhabiting the Nyika country between the coast and the Taru Desert, and includes the—

Wagiriama,
Wadigo,
Waduruma,
Wa Rabai,
Wa Ribe,
Wa Kambe,
Wa Jibana,
Wa Chonyi,
Wa Segeju (of separate origin, but intermarried).

Their customs are in the main similar but with one or two slight differences, which will be pointed out.

The penalty for murder is that from two to ten persons of the murderer's family be taken and given to the family of the murdered person. In default of this the murderer himself must be handed over to be put to death.

The persons so handed over appear to occupy a somewhat menial position, but being essentially "strengtheners of the family" are not regarded

[1] Art. 20, O-in-C. 1902: "In all cases civil and criminal to which natives are parties every Court (*a*) shall be guided by native law so far as it is applicable and is not repugnant to justice and morality or inconsistent with any O.-in-C. or Ordinance; and (*b*) shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay."

as slaves. This is certainly the case with the Wadigo, and probably with most other Nyika tribes. Boys handed over in the above manner among the Wadigo are on coming of age permitted to return home, but not so girls.

The Wadigo draw a distinction between a murder committed in the heat of passion and in cold blood, the number of persons demanded in the latter case being four times that in the former. In later years blood money has been reckoned at 100 joras of americani.

Other offences are punished by fines.

There is no limit to the number of wives a man may have; they are obtained by payment of a sum agreed with the woman's father or guardian. The contract is generally made when the girl is about eight years old.

The marriage price is security for the woman's good behaviour, and a divorce can always be arranged on terms of its repayment; and in the event of the death of the woman's father or guardian, it is recoverable from their respective heirs.

The eldest surviving brother of a deceased man is his sole heir, but he is burdened with the duty of providing a home for the deceased's widows and children. It is from the prices paid on the marriage of the daughters and re-marriage of the widows that their guardian benefits out of the inheritance.

Where there are no surviving brothers, the eldest son inherits, then the other sons in turn, then nephews and grandsons in turn, but all under the obligation of providing for the deceased's widows and children. If the children are young a cousin takes. If the eldest surviving brother of the deceased be younger than the sons, he inherits the wives and daughters only, other property being equally divided between the sons.

Amongst the Wa Rabai, if the eldest son be married, he inherits as sole heir and can make what arrangements he likes on behalf of his brothers.

In practice it frequently happens that the deceased's surviving brothers divide his widows and unmarried daughters between them.

In the event of there being no person so entitled by custom capable of inheriting, the widows and unmarried daughters are taken charge of by the nearest male relative of their respective mothers.

Ascendants never inherit, and females only in the case where there is no male collateral or descendant.

The Wadigo differ from all other Nyika tribes in this respect, that inheritance is traced in the first place through the deceased's sisters, and not his brothers. The heirs are the children of the deceased's sisters, which in practice resolves itself into the strongest nephew.[1]

Where there are no nephews by a sister, the inheritance goes to the

[1] In the case of an Mduruma or Mdigo who has become a convert to Islam, or "Haji," his children go on his death to the eldest brother of their respective mothers.

family of deceased's mother, and failing them, first to sons and then to grandsons of his maternal aunts.

An Mdigo father in like manner has no right of disposing of his own daughters in marriage, who are disposed of by his mother's brother.

All land is considered to belong to God, and cannot therefore be bought and sold, but trees and crops may be. An occupier's right depends on his cultivation of the land.

In the case of robbing from a plantation by night, the owner is justified, if he cannot recognise the thief, in shooting at and killing him, but not if he is able to identify him.

WAGIRIAMA—the most important Nyika tribe.

Habitat.—Coast strip from Rabai N. to the Tana River.

In the event of murder, the murderer is bound to pay to the family of the deceased two persons (generally children) to take the murdered man's place.

Should a man murder his own brother or father, the penalty is to pay one person only.

Should a man murder his own wife or child there is no penalty, as the murderer has in this case committed an offence against himself only, and destroyed his own property.

A marriage contract is made between the intending husband and the girl's father, and requires in theory the girl's consent; though this consent may be necessary if the girl is of full age, it would not appear to be so in cases where the girl is betrothed when still a child, as there is no provision for her repudiating the contract on arrival at maturity.

The price fixed for the bride is known as "mahunda," and is paid by the bridegroom's father, as no Mgiriama is capable of holding property till after his marriage.

The price varies according to the wealth of the parties.

This "mahunda" remains as a debt to be repaid the bridegroom's father, and is liquidated by the married couple either returning to his village and working for him or by their giving him a daughter.

When a marriage contract is made for a girl before she attains puberty, she remains with her parents till she attains puberty.

This does not appear, however, to be always the rule, for in many instances the child passes to the bridegroom's parents and is kept by them till she becomes marriageable.

When divorce is granted on account of the misconduct of the woman, she is returned to her father's house, but the father-in-law, or should he be dead his heirs, must in that case refund the "mahunda."

Should a woman leave her husband and not return to her father's house but go elsewhere, the man with whom she goes to live is liable to pay the amount of the "mahunda" as compensation to the first husband.

Wives are inherited by the deceased's brothers, and failing them by his nearest collateral male relatives.

Other property is inherited by the eldest son with an implied trust for the benefit of his brothers equally. Where, however, a particular shamba has been worked by one of deceased's wives, it is inherited by her own sons to the exclusion of step-sons.

A woman cannot inherit property.

Custom permitted of debts being paid with infant females.[1]

The binding form of oath is to swear by the hyena.[2]

Galla.

Habitat.—N. of the Tama River, behind the Lamu Archipelago.

As the *lex talionis* obtains amongst this tribe in a primitive form, blood can only be wiped out with blood. This not infrequently leads to lengthy vendettas which descend from father to son, and one murder leads to many deaths. Manslaughter not amounting to murder may be forgiven.

In cases of rape or adultery the offender may be publicly thrashed by the offended father or husband.

The penalty for theft is by the thief being ordered to make restitution of a property of a greater value than the article stolen; minor offences are punished with fines; and there is also a punishment of public cursing or excommunication which is resorted to in some cases to bring a backslider to reason.

Marriage is a matter of arrangement, the price paid for a wife going to her father, and the marriage tie is considered indissoluble.

On a man's death his wives are inherited by the brother of deceased, and failing brothers by his next of kin. Other property goes to the eldest son.

The Gallas hold slaves, and though a slave cannot own property he may be freed and adopted as a son by his master.

The form of oath considered binding by a Galla is by a spear.

Waboni.

These people are also known as Wasanya and Wat. They are a hunting tribe, living between the coast strip and the desert from the Galla country in the north to the Kilifi Creek in the south.

In the case of murder the murderer is handed over to the family of the murdered person to be dealt with.

Should the death have been caused by accident, the person who caused it is bound to produce another person to fill the place of the dead man.

Marriage is arranged by purchase.

[1] This is a custom to which the Courts would not give effect, as being essentially opposed to morality.

[2] Cf. note, p. 195.

The property of the deceased goes in the first place to his children, and failing them to his brothers.

The Waboni swear by stepping over the tail of a wild animal or a spear, with the invocation, "May this animal," or this spear, "kill me if I do not tell the truth." [1]

Wateita.

Habitat.—Teita Hills, near Voi.

Murder is punished among the Wateita on much the same principle as obtains among the surrounding tribes, but a difference in degree is recognised according to the manner in which the death was caused. The place of the man murdered must be filled by another, or compensation paid in cattle; in default of either of these methods of compensation the murderer is handed over or put to death. If the death has been caused by beating with a club the compensation is reckoned at ten goats and a bullock; if by wounding with a knife, sword, or arrow, at one girl, a hundred goats and a hundred head of cattle; if by poison administered internally the murderer is compelled to take the same poison.

In the case of accidental homicide the compensation payable is one child, or two head of cattle and five goats.

Other offences are punished by fines, of which one-half go to the elders and one-half to the party injured, *e.g.*:

Assault: fine	. . . .	one bullock.
Rape	„	two bullocks.
Adultery	„	four goats.

A thief is bound to make restitution of the stolen article, and also to give a present to the elders.

Marriage is arranged by a purchase, but in the case of a man dying and leaving widows, a somewhat unusual custom is observed.

The widows are not at liberty to leave the deceased's village, but are allowed to marry any one they please. A man who marries a widow is bound to support her family, and in the event of her death he goes away leaving in the family any offspring that he may have had by her.

Widows have also the further privilege of being allowed to inherit a share in any of the miscellaneous property other than live stock of which their husbands may have died possessed.

Live stock and daughters are divided equally between the sons, and should the numbers not be such as to permit of an equal division the share of the youngest son suffers.

An occupation right to land is recognised, but should a man leave the land formerly occupied by him uncultivated for a season this right lapses.

[1] Cf. note, p. 195.

Wataveta.

These people, who live on the eastern slopes of Kilimanjaro, show certain marked differences in their customs from those of the Bantu East African tribes, owing to the Masai influence.

The tribe is divided into degrees of rank, each degree being composed of members of a like age.

A custom in the nature of polyandry prevails, and it is usual for a man to lend his wives to his comrades of the same age-rank as himself.

Should a man, however, commit adultery with another man's wife without his consent, he is punished by fine and compensation, the amount varying in an increasing or diminishing degree according as the adulterer is above or below the age-rank of the husband.

The *lex talionis* is the old law of punishment for an offence against the person, but the due penalty may be compounded by payment of compensation in cattle.

Murder may be compensated by payment of thirty goats, six oxen, or three cows, with a fine of one ox, which goes to the elders. Payment of the compensation may be made by instalments and spread over a term of years.

Should a man cause another to lose a limb or an eye he is bound thereafter to contribute a goat to every public feast.

Theft is punished by the thief being compelled to refund the thing stolen and to pay five times its value, or to permit the person robbed to take anything he likes from him.

Marriage is arranged by purchase, and, as naturally follows in a society where polyandry prevails, divorce is not granted for adultery.

Divorce can, however, always be arranged by the woman getting some one to pay back to her husband the price originally paid for her. The husband can, with the consent of the elders, put away his wife if she refuses to work or causes him trouble by her ill conduct; in which case, if she has born no children, her relatives must return the price paid for her. If she has born a child only one-half of the price is returned, and if she has born two or more nothing remains to be returned.

On death a man's property passes to his sons, the eldest son taking the largest share; his widows go to his eldest surviving brother or should no brother survive him to his eldest surviving paternal cousin, who also acts as guardian of the other property if the sons are too young to look after it.

Should a man die leaving no son or near relations, the elders take charge. A woman cannot inherit, but should deceased leave no sons it is usual to give a small plot of land to his daughters, which on their marriage becomes the property of their husband.

Ownership of forest land is recognised, and the different members of a family each own their separate plot.

Strangers may obtain permission to hold land, for which they pay a rent to the owner.

Masai.

A tribe of nomads, the Masai, with their flocks and herds, stretch from Kilimanjaro across the plains and up the Rift Valley to the northern plateaux of the Protectorate. They do not till the soil and their wealth consists in their stock.

Murder is atoned for by the payment of heavy compensation to the relatives of the murdered man, amounting to as much as a hundred head of cattle; in the case of a boy being murdered the compensation is about half.

Should a moran (warrior) hear a moru (elder) cursing him he may kill the moru but must pay blood money of twelve cows to the murdered elder's relatives.

Intentional injury resulting in a broken bone is compensated by payment of one heifer. If the lobe of the ear be torn the compensation is one young ewe.

In the event of death or injury being caused unintentionally the elders settle what amount of compensation may be properly paid.

Theft of cattle, goats, or sheep is punished by the thief making restitution of twice the number of the stock stolen.

This rule applies to each person engaged in the theft.

If a thief on being caught admits the offence the fine is reduced.

A warrior on obtaining permission from the elders to marry after ten to fifteen years' service purchases his bride from her nearest male relative.

Divorce is practically unknown, but a wife in fear of her husband may take refuge in the house of a man of her husband's age and rank.

If a woman, however, voluntarily leaves her husband and goes back to her relatives, the marriage payment must be returned to him.

Should a warrior or boy commit adultery with a woman of his father's age-rank, he is liable to be cursed and to pay a fine of two oxen to have the curse removed. Adultery committed by a man with a woman of his own age-rank is no offence.

If an unmarried girl has had a child, the man who is in treaty for her in marriage may call on the father of the child to pay the marriage fee, and may take her to wife and adopt the child.

But it is permissible to procure abortion of a child conceived out of wedlock or to club it to death when born.

Incest with a daughter or one of her age-rank is punished by the other elders pulling down the offender's kraal and taking toll of his cattle.

Theoretically all the property of a deceased elder belongs to his eldest male child. But in practice he divides the greater portion of his cattle among his wives. On his death his wives give these cattle to their respective sons. But the eldest son takes the stock belonging to the childless widows. Should the eldest son be incompetent his brothers may make election of another brother to take his place.

If a man dies childless, his cattle go to his brothers and his widows to his half-brothers on the paternal side.

Should a widow afterwards have a son by a half-brother of the deceased or by another man, this son is given the cattle which he would have inherited had his mother's first husband not died, being regarded as a member of the deceased's family.

The property of minors is taken care of for them till they grow up.

A man may not inherit the property of his maternal uncle.

Land is frequently named after the section of the tribe that first used it as a grazing ground, or is for the time being occupying it. But individual rights to land as distinguished from tribal rights to land are not recognised.

If a speaker's veracity is challenged, if a man he swears "By my sister's garment," if a woman, "By my father's garment." [1]

Note.—The Masai form is "'N-gilani e-'n-gerai o-'l-poror lang" or "'N-gilani e-'n-gerai ai." This is used by men only. (Hollis.)

Bantu Kavirondo.

Habitat.—The slopes and valleys N.E. of Lake Victoria.

Marriage is arranged with the parents of the bride, while she is still a young girl, and the suitor pays them the agreed price by a succession of presents.

Should the wife die after marriage without bearing a child to her husband, he may claim from her parents one of her younger sisters as wife in her place, or demand the return of the price originally paid for her.

This same course of action is open to the husband should he divorce his wife on account of a fault committed by her. On the other hand, should the divorce be due to the fault of the husband, and the woman marry again, the price originally paid is returnable.

Amongst certain Kavirondo tribes (Nyole, Lakoli, Ithako, Ishuka) the son-in-law retains a claim to all the produce of the cows which he paid for his wife, till such time as all the cows originally given have died.

On death a man's property is divided equally between his children, and his widows go to live with their sons. Should there be left a widow with small children and no grown-up son, she becomes the wife of the eldest son by another wife, or if there be no grown-up son, of the brother of the deceased.

[1] Cf. note, p. 195.

A man cannot marry his aunt; she is consequently pensioned off with one cow.

Jaluo Nilotic Kavirondo.

As with the other branch of the tribe, marriage is arranged by an early betrothal, and the price is paid by continued small payments from time to time. Should these payments cease before the agreed price has been liquidated, the girl returns to her father's house.

If the wife should prove childless, the payments are returned to the husband, or the father-in-law provides him with another wife.

Should a wife desert her husband and marry another man, the first husband is entitled to receive from the second the same price as that he originally paid his father-in-law. If there have been children of the union before the desertion of the wife, they remain with their father.

A man's property goes on his death to his children, but if they are small, to the eldest brother.

If the eldest son is grown up he takes all the property in the first instance, but is bound to give a share to each of his brothers. Should he have sisters, the marriage payments for them go to the eldest brother of the deceased, who also takes the deceased's wives, with the exception of the youngest, who goes to the eldest son.

Though the Kavirondo do not wear clothes, a breach of decorum such as touching the ornamental tail worn by the married women is regarded as a punishable offence. (See Mr. Partridge's Report below on Criminal Case 274/1904.)

A person challenged may swear to his innocence or his veracity by stepping over a piece of "Murembe" tree placed between him and his challenger, and saying, "If I am guilty," or, "do not speak the truth, may this tree rise and kill me." If "Murembe" is not procurable, a solanum plant known as "Tunguja" in Ki-swahili is used. (Hobley.) [1]

Report by Mr. Partington on Criminal Case 274/1904, *Town Magistrate, Kisumu.*

Rex v. *Mania and Others.*

Any act, such as touching the "tail" of a married woman, or in the case of an unmarried girl her frontal beads, and, of course, much more her private parts, is considered among the Nilotic Kavirondo an indecent offence. The woman should at once go back to her village and remain in her hut for certain days of purification. It is left largely to her discretion to decide the amount of moral damage she has suffered, and the number of days of purification required. Meanwhile the "Wazee" send for the offender and arrange the matter. Usually a feast paid for by the man ends the matter

[1] Cf. note, p. 195.

unless he has assaulted her. Although these customs are still kept up in their own homes, they are not so strict outside as formerly.

In the present case, however, the Nilotic Kavirondo would, I think, undoubtedly regard the Kavirondo girl as having been made unclean.

Akamba.

Habitat.—From the Nyika tribes near the coast north-westward to the Kikuyu country.

Murder is compensated for by the payment of blood money, and this compensation is payable whether the death was caused intentionally or by accident.

Payment for a man is eleven cows, one bull, one goat; payment for a woman is four cows, one bull, one goat: the cows being the compensation payment and the bull and goat the elders' fee. No compensation is payable in the case of a man who is killed while trespassing in a strange boma or shamba by night.

Theft is punished by the thief being ordered to restore the property stolen, and to pay a fine to the elders according to the value of the property.

The punishment for rape is for the offender to be beaten and to pay a bull as compensation to the woman's husband, or if unmarried to her father. Should the offender be killed *in flagrante delicto*, no compensation is payable.

Assault resulting in injury to person is compensated on the following scale:

Injury to Man.	Compensation.
Simple assault	1 goat.
Loss of hand or arm	5 cows and 1 bull.
„ leg	Do. do.
„ eye	1 cow.
„ both eyes	11 cows and 1 bull.
„ nose	1 cow and 1 bull.
„ teeth	1 goat for each tooth.
„ finger	1 cow.
„ ear	1 goat.
„ hearing	1 cow.
„ male organs	5 cows.

Injury to Woman.	Compensation.
Loss of hand, arm or leg	1 cow.
„ eye	1 bull.
„ both eyes	2 cows.
„ finger	1 bull.
„ breast	1 cow.
„ both breasts	2 cows.

Compensation for injury done to a woman goes to her husband or father as the case may be.

As in English law drunkenness is no excuse for an injury done, but should a guest, while at his host's boma at a drinking bout, either commit an offence himself or be killed or injured by a third party before reaching home, his host is responsible for payment of the resulting compensation.

In like manner, should one person employ another on his business and he meet with an accident while so employed, the person who employed him is liable to pay compensation.

In like manner also, the owner of a bull or cow that does injury is liable to pay compensation for the injury done.

Certain trees are considered sacred by the Akamba, and should any one damage one of these trees he is fined one cow and one bull, which go to the elders.

No one has the right to obstruct a road or water-way, and any interference with a water-trench is punished by the fine of one bull.

Marriage is arranged by purchase, and no woman can hold property.

All family property is vested in the head of the family and on his death everything passes to his eldest son, who assumes the headship of the family, with the obligation of providing the marriage price for his brothers with which to purchase wives.

The purchase price of his sisters is divided amongst the whole brothers of the bride ; should she have no whole brothers, then amongst her brothers of the half blood.

Should a man get an unmarried woman or the wife of another with child and she die in giving it birth, he has to pay blood money. If, however, before her death he had made an arrangement to pay the marriage price, no blood money is payable.

The Akamba have no form of oath considered generally binding, but perform certain rites to evidence the honesty of a claim to property.[1]

If the eldest son at the time of his father's death is a minor, the eldest surviving brother of the deceased acts as guardian.

The widows of the deceased remain in the boma as members of the family.

There is no individual ownership of land, but family rights of occupation are recognised.

Akikuyu.

Habitat.—From the Ngong hills along the slopes of the Escarpment in a north-easterly direction to Mount Kenia.

A death, whether caused by accident or design, is compensated for by a payment of a hundred goats in the case of a man, and thirty goats in the case of a woman.

[1] Cf. note, p. 195.

Injury to the person is compensated for by a scale of payments as follows:

Loss of leg or hand	50 goats.
Loss of a finger	10 „ for every joint.
A serious spear-wound	30 „
An ordinary sword-wound. . . .	1 sheep compensation and 1 sheep to be eaten in common.

If a thief steal goats he must repay ten for every one stolen.

Theft of honey from a honey barrel is punished with a fine of ten goats; theft of a sword, one goat; theft of produce from a shamba, three sheep.

Theft of ivory can never be compensated for, and a man's heirs may be called on to pay for stolen ivory without reference to any previous payments that may have been made.

If a man burn down another's hut, the compensation payable is thirty goats.

The punishment for adultery is ten goats compensation to the injured husband, and a fine to the elders.

Should the slayer of another be too poor himself and his family to pay compensation, he has to serve the family of the deceased until the debt is paid.

If death be caused by a child and his family be unable to pay, he is on attaining manhood treated in a like manner.

If the death be caused by a girl, the price paid for her on marriage can be claimed by the relatives of the deceased.

Marriage is a matter of purchase and sale in which the woman has no say, as the contract is usually made when the woman is quite young. The woman remains with her parents till about the age of fourteen, when her husband comes and takes her away. The average price paid is thirty goats.

Should a wife desert her husband and go to another man, he must pay the husband the price paid by him for the woman, in which case he can keep her. Otherwise he sends her back and pays ten goats to the husband. The feelings of the woman are not consulted, and cases are known where women have hanged themselves rather than live with a man whom they do not like.

Should a woman desert her husband and return to her father, the father must repay the husband the marriage price.

In only one matter does it appear that a woman is regarded otherwise than as a chattel. A debtor may satisfy his creditor with the payment of a woman, but this can only be done with the consent of the woman herself.[1]

[1] Report by Mr. Donald on Civil Case 137/1904, Collector Dagoretti, *Methega* v. *Karoga*.

On death a man's property is taken charge of by the eldest son if of age, to divide equally between all the sons.

If there be no son or no son of sufficient age to take charge of the property, it passes to the eldest surviving brother.

Whoever takes charge of the property takes over with it responsibility for payment of the deceased's debts and for the maintenance of his widows.

It is the usual custom to pay three goats to the elders for hearing a shauri, the equivalent of our "Court Fee" on taking out a summons.

The Akikuyu have no recognised form of oath, so far as ascertained.[1]

Report on Methega v. *Karoga.*

Kamao, brother of the defendant, who had died just about the time of the famine, had stolen three goats of the plaintiff. The plaintiff took no action in the matter till February 23, 1904, when he instituted proceedings against Karoga, brother of Kamao (deceased), for the recovery of these goats in the Court of the Collector at Dagoretti. The case came on for hearing on February 27. It having been ascertained that defendant had succeeded to his deceased brother's property and also got possession of his wife and child, judgment was entered in favour of plaintiff for thirty goats against defendant in accordance with Kikuyu custom. Njoroga (Chief) gave evidence in the case as to the custom among Kikuyus in such matters. After this the parties effected a compromise out of Court, the defendant agreeing to make over his deceased brother's daughter, Nbothi by name, to the plaintiff in full satisfaction of the decree. I do not think that there can be any doubt that this compromise was acted upon for the time, and there is nothing to prove that the officials at Dagoretti had any knowledge of it. No complaint was made to them. Apparently the girl was not satisfied, for she on four occasions ran away from plaintiff and went to her mother's place, who was at the time a mistress to one Kachuhi, living on Dr. Scott's land. Kachuhi is said to have been her lover since her husband's death. The plaintiff alleges that the girl left him at the instigation of her mother. The issue arises whether defendant had power to effect this compromise. From the evidence of nine of the important chiefs, and also from plaintiff's statement, it is evident that the defendant had no power according to the Kikuyu custom to enter into this arrangement *without the consent of the girl.* It is clear that the girl was not a consenting party. The only person who affirms he was vested with such power is the defendant himself.

NANDI.

As with other tribes, marriage is a matter of purchase, and if the wife prove childless the price paid is returnable.

[1] Cf. note, p. 195.

The eldest brother of the deceased inherits all his property including his wives, with the exception of his weapons, which go to the eldest son.

NOTE.—The meaning and object of an oath as generally understood among the native tribes partakes rather of the nature of "trial by ordeal" of an accused person than of a mode of adding solemnity to evidence. The method of trial by an ordeal of poison and by certain forms of "making dawa" or witchcraft are prevalent among most tribes, particularly those of Bantu origin, in addition to or in place of the forms of oath quoted above. It is consequently contrary to native ideas that a person who is a witness only should be made to undergo an ordeal which should, according to their way of thinking, be reserved for the accused. This conception of justice, common to all peoples in a primitive stage of development, that an accused person must clear himself of the charge, and may do so by accepting an ordeal, does not accord with our system, which strives to bring home to the mind of the witness the serious responsibility that lies upon him to speak the truth, inasmuch as the fate of the accused depends directly on his evidence. There would, however, seem to be no reason why the natives should not be further educated to this point of view by the tribal form of oath, where one exists, being adapted to the requirements of our system of trial, which removes responsibility from the accused and places it on the witness. The members of those tribes who do not understand the nature of an oath may be affirmed to speak the truth. (*Vide* Native Oaths Ordinance, 6 of 1906.)

NOTES.

Comparative Law in Blue-Books.—The Dominions Department of the Colonial Office has made a new departure in publishing a blue-book containing a report upon the work of the Department for the year ending March 31, 1909 (Cd. 3735, King's Printers, 11*d.*). It is in effect a review of the principal events in the self-governing dominions and includes a brief survey of the legislation. The text of some Acts of special interest passed during the period under review is published in an Appendix. There are three each of New Zealand and the Transvaal, two each of the Commonwealth of Australia, New South Wales, Queensland, and Natal, and one passed by the Western Australia Legislature. Another Appendix contains a list of the more important blue-books relating to the dominions published in the year, but does not give the prices nor any information beyond the titles.

Electoral Systems.

A Royal Commission was appointed in 1908 "to examine the various schemes which have been adopted or proposed, in order to secure a fully representative character for popularly elected bodies." Their report (Cd. 5163, Eyre & Spottiswoode, 6½*d.*) comments upon the laws in force in European countries and various parts of the British Empire. Appendices contain the text of the statutes relating to the Alternative Vote in Queensland and Western Australia, and extracts from the report of the Chief Electoral Officer upon the working of the latter in the General Election of 1908, and a description of the systems in force in other countries, with details as to the laws in Belgium and France and the transferable vote in Tasmania.

Patents.

The Colonial Office have issued a list (Cd. 4996, His Majesty's Stationery Office, 1*d.*) of colonial laws dealing with patents, trade marks, and the marking of merchandise, and regulations issued thereunder. No particulars whatever are given of the laws, but only the references. For particulars of the laws, reference may be made to a recently published volume by Mr. W. C. Fairweather, with the title *Foreign and Colonial Patent Laws* (London: Constable & Co.).

Second Chambers.

A return has been published by the Colonial Office (House of Commons Paper, No. 81, 2½*d.*) to show for each legislature in the self-governing dominions (1) the composition of the Second Chamber and the method of nomination or election; (2) its powers or disabilities with regard to (*a*) finance and (*b*) general legislation; (3) the provisions, if any, for the adjustment of the differences which may arise between the two Chambers with regard to (*a*) finance and (*b*) general legislation.

Wild Animals.

Correspondence during the year 1909 between the Foreign Office, Colonial Office, High Commissioner of South Africa, and the governors of other African territories in respect to the preservation of wild animals has been published in a blue-book (Cd. 5136, King's Printers, 1*s.* 3*d.*). The text of various Acts and Ordinances which have been modified during the past two years is given in the course of it,[1] and finally extracts from Ordinances, Proclamations, etc., defining game reserves in British Colonies and Protectorates.

Domestic Relations in Japan.—The rapid transformation of Japan gives a special interest to this article by Mr. Masuji Miyakawa. Sir Henry Maine has noted in his *Ancient Law* the remarkable persistency among the Romans of the *patria potestas*. Not less remarkable is its sway in Japan under what is called "the power of the family head." It still dominates all rival legal conceptions. In the political sphere this is illustrated in the Japanese fidelity for 2550 years to the Imperial dynasty as head of the great family of the State —the supreme *paterfamilias*. But it is "pretty to observe," as Mr. Pepys would say, how this doctrine of the *patria potestas*—this *imperium in imperio*—is under the influence of modern ideas passing through the same change that it did in Rome. Public opinion tempered by degrees that strange domestic despotism, and there were duties attaching to the patriarchal head, such as the moral obligation to provide for all members of the family out of the common fund, which balanced the rights. In modern Japan the old feudal absoluteness of the family head has gone. His powers are to be exercised "only for the best interests of and when necessary for the administration of the house"—so the Japanese Court of Appeal has decided—and "if injustices are alleged the Court are to investigate them and set aside, if necessary, any unfair exclusion of a member by the family." If a family head abuses his powers, such powers may be suspended. In a word, the rights of the *patria potestas* are fading, while its duties are emerging into clearer relief.

"**The Broad Stone of Empire.**"—Under this title Sir Charles Bruce has written an interesting and valuable work dealing with "Problems in the

[1] See also *Legislation of Empire*, Index *s.v.* "Wild Animals, Protection of."

Crown Colonies"—problems of the form of government, problems of law, of religion, of health, of population, of education, of fiscal systems, of schemes of defence—agriculture and forestry, transport and telegraphs, tropical diseases, and intoxicating liquors, earthquakes, storms, and insurance of crops. On all of these topics and many more Sir Charles Bruce has something suggestive to say derived from his long experience as a colonial administrator. To him all the subordinate problems present themselves as part of the general problem of adapting to every constituent portion of the Empire the principles that underlie the British Constitution. These principles he expresses figuratively under the title of *The Broad Stone of Empire*, adapted from Sir Kenelm Digby's well-known work, *The Broad Stone of Honour*, and he illustrates them by a graphic anecdote of the Bishop of Strasburg. The Bishop sent his brother, Count Rathol, a large sum of gold to build him a strong castle as a place of security against the power of the Emperor. When he arrived at Hapsburg no walls appeared; instead of them he saw only two lines of warlike troops, infantry and cavalry, and heard a flourish of trumpets. Surprised and incensed, he demanded the reason. "These," said the Count, "are all our people ready to do us honourable service, and this is better than stone walls without hearts and arms to defend them." And so in the love and fidelity of its people, its civil and religious liberty—the recognition of what Alexander Hamilton called the "sacred rights of mankind"—Sir Charles Bruce finds the "Broad Stone" of the British Empire. Everywhere it is the ethical basis on which he lays stress. But the merits of the work must be reserved for fuller consideration than can be given them in the compass of a Note.

Defamation and Reputation.—When an action is brought against a person for defamation he has a right to minimise damages if he can by showing that the plaintiff's previous character was so notoriously bad that it could not be impaired by any fresh accusation, even though undeserved. For the gist of the action is the injury done to the plaintiff's reputation, and if the plaintiff had what Mr. Mantalini would call a "demnition" reputation he cannot be entitled to more than nominal damages. But this way of proceeding is, as Dr. Blake-Odgers says, "a very dangerous one," and so it proved in a recent New South Wales case of *Raftery* v. *Russell* (10 N.S.W. 200). The defendant there, a farmer, had used words conveying very serious imputations on the chastity of a fair widow who lived in the same district and took boarders. He was sued for slander, and to justify his plea of "not guilty" and minimise damages, he told his nephew to "see people about the case," "to inquire in connection with the case in general." Thus instructed, the nephew saw "a good few in connection with the case," that is, in reference to the lady and her character: interviewed people who had boarded with her and advertised in the *Daily Telegraph* trying to get the names of other persons who had boarded with her. In making these inquiries the defendant

was acting within his rights; but he was "playing with edged tools," and the judge at the trial directed the jury that on the question of damages they might take into consideration—by way of aggravation—the inquiries made, and acting thereon the jury found a verdict for the plaintiff, with damages £350. This was said to be misdirection, and on an application for a new trial one judge held that it was, but a majority of the Court held the other way. Advertising under such circumstances is very like insinuating a fresh imputation.

Laws of Inheritance among Uncivilised Peoples.—The more closely the institutions of barbarous or semi-barbarous nations are studied, the greater appear their diversities. We have learned to realise the immense variety of dialects to be found within a small area of Africa, for example. We are beginning to do the same with respect to the laws and institutions of such races. Mr. Torday in a paper lately read at the Geographical Society on the "Land and Peoples of the Kassai Basin," brings out this point in several striking ways. For example, as to inheritance, he remarks as to the Baboma tribe, "a peculiarity in their social organisation is seen in the fact that a man's property is inherited by his wife if he has no brothers (who are the normal heirs). To this there is an exception in the case of the chieftainship, which, if the deceased has left no brother, descends to the son, or failing a son to the daughter." In the neighbouring tribe of the Basonge, "power is inherited in the male line, but the actual successor is chosen by the senior elder after consultation with another or with the others." Among the Basongo Meno, "the property of a man is inherited by his children in order of age and irrespective of sex." Among the Bankutu, property descends in the male line, but there are indications that at one time relationship was considered stronger on the female side. Among the Bapindji, property descends in the female line. The tribes or sub-tribes with these varied customs live in economic circumstances much alike; a fact worthy of the consideration of those who are tempted to indulge in plausible explanations of legal differences by purely economical causes.

Primitive Government in the South Seas.—One day we shall perhaps have a real account of the forms of government among primitive people; not an account of what hasty travellers, and still more hasty theorists, assume them to be, but the actual forms. The materials are accumulating, and among those recently collected we would call attention to the results of the researches of Dr. Richard Thurnwald of Berlin, who in the *Zeitschrift für vergleichende Rechtswissenschaft* gives an account of the laws of the natives of the South Seas of the Melanesian group. Among them exist no regular law and no legal maxims. But they have a latent *Rechtsbewusstsein* which leads them to act in certain ways, to approve of certain conduct, to disapprove of others. They have even a certain rudimentary international law. The peculiarity of the society is an elaborate system of alliances between the chiefs; alliances which change from time to time.

The society is a "Bündnispolitik unter souveränen Herrschern." The whole article is instructive, and will help to enlarge and correct notions as to primitive governments.

Legal Bibliography.—Several periodicals here and abroad give information as to legal bibliography. All the same, we welcome the proposal to establish at Berlin an International Institute for the Bibliography of Jurisprudence. According to the programme, the Institute promises to do for jurisprudence what has been done by the International Institutes for "Sozial-bibliographie," for "Techno-bibliographie," and for the bibliography of medicine. It will endeavour to deal not only with books, but also with periodical literature. Renan is reported to have said, "Fifty years hence no one will open a book"; the book would have been superseded as something too cumbrous and pedantic for future generations. And certainly in law a vast amount of general work is buried in periodicals the contents of which may be unknown to the more industrious student.

"The Gladsome Light of Jurisprudence."—The new Annual Bulletin published by the Comparative Law Bureau of the American Bar Association testifies to the growing interest in Comparative Law. Already, the editor tells us, twenty-one States of the American Union have provided Legislative Reference Bureaus where the statutes of other States and foreign countries can be found; the American libraries are increasing their collections of foreign law works, and translations are multiplying. There seems hope that even the practising lawyer may in time "absorb the philosophy of jurisprudence." The Bulletin marshals him the way in admirable fashion. There is a summary of the more important Acts passed during 1909 by foreign countries, including France, Germany, Great Britain, Holland, Belgium, Spain, Switzerland, Austria, Latin America, China, and Japan; and this review of legislation is accompanied, under the title of "Jurisprudence," by notes of the principal judicial decisions of the year. These are supplemented by a bibliography of the more notable law-books which have appeared, and a list of articles. The common reproach of lawyers of being too self-centred in the sphere of their special activities no longer attaches to America. Among a number of articles which give distinction to the Bulletin may be mentioned a comparison of the Spanish and French laws of marriage, a comparison of the Spanish and Anglo-Saxon criminal law and codification in the Philippines, and domestic relations in Japan.

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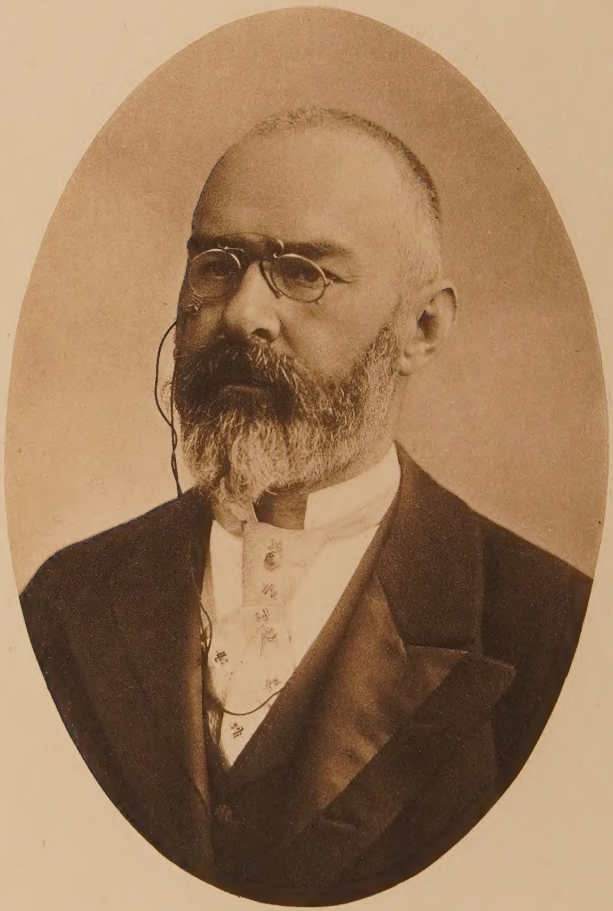

The new President of the Hague Tribunal;
Professor Heinrich Lammasch.